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No. 16273

VOL 3102

United States
Court of Appeals
for the Ninth Circuit

COOK AND SONS EQUIPMENT, INC.,
Appellant,

vs.

MORRIS KILLEN,
Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILED

JUL 17 1959

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

ROBISON & McCASKEY,

638 Fourth Ave.,
Anchorage, Alaska,

For Appellant.

BELL, SANDERS & TALLMAN,

Central Bldg.,
Anchorage, Alaska,

For Appellee.



In the District Court for the District of Alaska,
Third Division

No. A-9214

MORRIS KILLEN,

Plaintiff,

vs.

CHARLES COOK, and CHARLES COOK, JR.,
d/b/a COOK & SONS EQUIPMENT COM-
PANY, in the State of California,

Defendants.

COMPLAINT

Comes now the above-named Plaintiff, and for his cause of action against the above-named Defendants, and each of them, alleges and states:

I.

That on or about the 27th day of September, 1952, the above-named Defendant, Charles Cook, and Charles Cook, Jr., acting for themselves and on behalf of Cook and Sons Equipment Company, wrongfully stole, took and carried away from the Territory of Alaska, one certain truck automobile described as follows:

One International Dump truck, Model 1952,
Motor No. RD450-18333, Serial No. 1252, of
the value of \$17,000.00,

which was the property of the plaintiff herein.

II.

That the taking of said property was wrongful and amounted to conversion, and as a result thereof, the Plaintiff has suffered damages to the extent of \$17,000.00, together with interest thereon at the rate of 6% from the date of the taking of said truck.

Wherefore, Plaintiff prays judgment against the Defendants, and each of them, for the sum of \$17,000.00, together with interest thereon at the rate of 6% per annum from the 27th day of September, 1952, and for all costs of this action including a reasonable sum as attorneys fees for Plaintiff's attorneys.

BELL & SANDERS,

By /s/ BAILEY E. BELL,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed October 20, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come Now, the defendants herein, and move the Court for an Order dismissing the above-entitled cause on the grounds and for the reason that the Complaint herein does not state a cause of action upon which relief can be granted.

Dated this 7th day of November, 1953.

KAY, ROBISON & MOODY,

By /s/ RALPH D. MOODY,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed November 9, 1953.

[Title of District Court and Cause.]

M. O. DENYING MOTION TO DISMISS

Now at this time, motion submitted without argument by Wendell P. Kay, for and in behalf of the defendants in cause No. A-9214, entitled Morris Killen, plaintiff, versus Charles Cook and Charles Cook, Jr., d/b/a Cook & Sons Equipment Company, in the State of California, defendants,

It Is Ordered that motion to dismiss, be, and it is hereby, denied and defendants given ten (10) days in which to Answer.

Entered November 27, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now, the Defendants, Charles E. Cook, Jr., Charles E. Cook, III, individually and d/b/a

Cook & Sons Equipment Company, Inc., a California corporation, in answer to the complaint on file in the above-entitled cause and allege as follows: Separate Answer of Charles E. Cook, Jr., and Charles E. Cook, III.

I.

That Charles E. Cook, Jr., who was served the Summons and Complaint in the above-entitled matter is a stockholder, member of the Board, and President of Cook & Sons Equipment Company, Inc., a California Corporation, and that Charles E. Cook, III, is a stockholder and representative of Cook & Sons Equipment Company, Inc., a California corporation.

II.

The Defendants, Charles E. Cook, Jr., and Charles E. Cook, III, hereby deny each and every allegation contained in Plaintiff's complaint on file herein and having fully answered Plaintiff's complaint herein, pray that said complaint be dismissed against these Defendants and that they be awarded their Court costs and attorney's fees herein incurred.

Answer of Corporation—Cook & Sons Equipment Company, Inc.

That Defendant corporation denies each and every allegation contained in Plaintiff's complaint and by way of a separate answer and affirmative defense thereto, alleges as follows:

I.

That Defendant corporation executed a conditional sales contract covering the vehicle described in Plaintiff's complaint on May 7, 1952, under which contract Mahlon J. Connett, agreed to purchase said vehicle at and for a total price of Thirteen Thousand Four Hundred Ninety-six Dollars and 18/100 (\$13,496.18); that in the month of September, 1952, said contract was delinquent and in default in that monthly payments required to be made of the Buyer were delinquent and unpaid; that at that time there remained due and unpaid balance on the contract in the amount of \$8,474.76;

II.

That in addition to the delinquency and default of the buyer in not making monthly payments as required under the contract, said Buyer was further delinquent and in default in that he sold, assigned, or in some manner attempted to transfer his equity and rights as purchaser under the contract to Morris Killen contrary to the terms of the contract and in violation thereof.

III.

That the Defendant herein at all times retained title to the vehicle described except that Defendant herein did assign the contract to the Bank of America, Van Nuys Branch, California, with right of recourse against the Defendant and upon failure of the Buyer in said contract to meet and make

the payments when due, Bank of America re-assigned the contract to this Defendant and this Defendant did then and there have to pay and re-pay the Bank of America the balance owing by the buyer on said contract, and did thereafter, due to the buyers delinquency and default under said contract, forfeit the interest of the Buyer and any persons claiming interest therein and did retake possession of said vehicle to which defendant was there and then lawfully entitled in a lawful manner under the terms of the contract as provided by law.

Wherefore, having fully answered plaintiff's complaint, defendant prays that plaintiff's complaint be dismissed and that plaintiff take nothing thereby, and defendant be awarded its costs and attorney's fees herein incurred together with such other relief as to the Court may seem just.

Dated this 4th day of December, 1953.

KAY, ROBISON & MOODY,

By /s/ PAUL J. ROBISON,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed December 4, 1953.

[Title of District Court and Cause.]

TRIAL MEMORANDUM

I.

The facts in the above case are that the defendant did sell one truck on or about May 7, 1952, under a Conditional Sales Contract to Mahlon Connett. The buyer, Connett, in turn did resell the truck to plaintiff Killen, a good faith purchaser for value. On or about the 27th day of September, 1952, the defendants took possession of the truck without permission of the plaintiff and removed said truck from the Territory of Alaska.

In their Answer, the defendants admit the taking of said truck, admit that a Conditional Sales Contract was executed covering the truck and based their taking upon the original purchaser Connett, being in default in his payments.

II.

The applicable Territorial Statutes are Section 29-2-18 A.C.L.A. 1949, and Section 29-2-25 A.C.L.A. 1949.

Section 29-2-18 provides as follows:

“Redemption by Buyer: Seller to Furnish Statement of Sum Due. If the seller does not give the notice of intention to retake described in Section 17 (Sec. 29-2-17 herein), he shall retain the goods for ten days after the retaking within the state in which they were located when retaken, during which period the buyer, upon payment or tender

of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods, or upon performance of tender of performance of any other promise for the breach of which the goods were retaken, and upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred." * * *

Section 29-2-25 provides as follows:

"Recovery of Damages by Buyer After Retaking Goods. If the seller fails to comply with the provisions of Sections 18, 19, 20, 21 and 23 (Sections 29-2-18, 29-2-21, 29-2-23 herein) after retaking the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract with interest. (L 1919, ch 13, sec. 25, p. 38; CLA 1933, sec. 3045.)"

It is contended by the plaintiff that the defendants violated the above sections, in that they immediately removed the truck from the Territory.

III.

The defendants admit that the truck was sold or that the buyer's interest, whatever it was, was transferred to the plaintiff.

47 Am. Jur. 134, Section 927, at page 136 describes the rights acquired by transferee.

“Rights Acquired by Transferee: Rights of Original Vendor. * * * The rights acquired by a transferee of the conditional vendee include the right of possession the right of acquiring a complete title by payment or tender of the balance of the price agreed upon—even prior to the due date of all the remaining instalments and despite express restrictions against sale, assignment, or mortgage—and the right to redeem the property after default.” * * *

IV.

As to the question of the vendors liability for violation of the vendee's rights, whose rights were acquired by plaintiff Killen as a good faith purchaser, the plaintiff cites 47 Am. Jur. 150, Section 941, as follows:

“Vendor's Liability for Violation of Vendee's Rights. * * * A conditional vendor who refuses to grant to the vendee his statutory right of redemption where he is entitled thereto renders himself liable for conversation or statutory penalty. Likewise, the vendor is liable to the vendee for damages in retaking the property in an unlawful manner, as by trespass or the use of force, or for the unlawful disposition or resale of the property after repossession, such as by a sale not in compliance with statutes relating to resale, or by failure to sell as required by such statutes. * * * Under the Uniform Conditional Sales Act, if the vendor, after retaking

the goods, fails to comply with the provisions of the Act regarding redemption, compulsory resale by the vendor, resale at option of the parties, proceeds of resale, and rights of the parties where there is no resale, the vendee may recover from the vendor his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract with interest." * * *

V.

It is contended by the plaintiff that the rights of redemption provided for under the Uniform Conditional Sales Act recognized in Alaska, is not lost by any violation of the contract or removal of the property. In support of this, plaintiff cites 47 Am. Jur. 167, Section 958, at page 168, as follows:

"Redemption by Vendee. * * * The right of redemption under this Act is not lost by the vendee's violation of the contract by removal of the goods or by his transfer of his interest without the notice required by the statute." * * *

VI.

It is contended by the plaintiff that the defendants have violated the express provisions of the Uniform Conditional Sales Act as set out above, in that they retook possession of the truck without consent and removed it therewith from the jurisdiction of the place (Territory) before the expiration of the ten-day period of redemption required by law. Therefore, the plaintiff is entitled to judg-

ment as a matter of law, leaving only the possible question of the amount of damages that should be awarded the plaintiff. In determining this matter, the plaintiff maintains that the controlling factor is the section quoted supra pertaining to same.

Respectfully submitted,

BELL, SANDERS & TALLMAN,

By /s/ BAILEY E. BELL.

Receipt of copy acknowledged.

[Endorsed]: Filed August 4, 1958.

[Title of District Court and Cause.]

MEMORANDUM OPINION ON
MERITS OF CASE

This controversy arises from the act of the defendants in seizing an International Dump Truck, Model 1952, on September 27, 1952. Said defendants drove the truck out of the Territory of Alaska back to the State of California. The seizure was made under the terms of a conditional sale contract dated May 7, 1952, and executed in the State of California. The sale was made to one Mahlon J. Connett under a conventional Automobile Conditional Sale Contract. Purchaser at that time paid \$5,000.00 as a down payment and agreed to pay the balance of the purchase price in the amount of \$8,496.18. The terms upon which balance was to be paid were \$403.76 monthly beginning June 20,

1952, and thereafter on the 20th day of each month until the full amount had been paid. The terms and conditions of the contract were such that the title to the property should remain in the Seller. Until the full amount had been paid, it was agreed, among other things, that:

“1. * * * Purchaser * * * shall not transfer any interest in this contract or said property.”

It was then agreed that:

“3. * * * in the event Purchaser defaults on any payment due under this contract or fails to comply with any condition or provision of this contract (emphasis mine) * * * Seller * * * may take immediate possession of said property without demand, * * *.”

It was understood when the contract was made that the truck was to be transferred to the Territory of Alaska. In fact, the Purchaser then lived at Fairbanks, Alaska, and the Conditional Sale Contract so specified. Immediately thereafter the truck was taken to Alaska by the Purchaser with the knowledge and consent of the Seller. While being used in Alaska, the Purchaser (Mahlon J. Connett), on the 25th day of June, 1952, assigned his interest in the contract to the plaintiff. This was done for a valuable consideration in a transaction between the plaintiff and the said Mahlon J. Connett. Under the terms of the assignment, the Purchaser (Mahlon J. Connett) not only agreed to convey and deliver the absolute possession of the

truck to the plaintiff, but that, in addition, he would “* * * pay all indebtedness against the truck and clear the same completely within ninety (90) days from this date, * * *.” (June 25, 1952.)

According to the testimony, he did not make the payment and, because of the default both by the transfer (contrary to the terms of the contract) and by failure to pay due installments, defendants elected to seize the truck, as authorized by the letter of the contract, and then transported it immediately back to California. This they did on the 27th of September, 1952, without notice to the plaintiff. The evidence shows that one of the defendants came to Alaska, went to the place where the plaintiff had the truck stored, seized it without notice or permission, and immediately transported it back to California.

Because of this summary act on the part of the defendants, and, believing that the Conditional Sale Contract was to be interpreted under the laws of the Territory of Alaska, this suit was filed for damages as provided by statutory law of the Territory of Alaska.

1. It was understood when the Conditional Sale Contract was executed that the truck would be brought to the Territory of Alaska. It was so brought and performance of the obligations of the contract was within the Territory of Alaska.

It is fundamental that an executory contract of the character of the contract in question should be

construed under the laws of the state of performance. There can be no question but that the parties understood that the contract was to be performed in the Territory of Alaska.

2. Adverting to the statute law of Alaska, concerning which it should be stated, in passing, that it is the Uniform Conditional Sales Act, Title 29 (chapter 2), A. C. L. A. 1949.

“29-2-1. Terms defined. * * * ‘Conditional Sale’ means (1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part (or) all of the price, or upon the performance of any other condition of the happening of any contingency * * *.”

It will be observed that a conditional sale under the laws of Alaska not only comprehends installment payments on the purchase price, but “upon the performance of any other condition.”

The sales contract under observation stipulated, among other things, that the purchaser should “not transfer any interest in this contract or said property.” The contract against transfer was to be considered a default if it occurred. Witness this language:

“3. * * * in the event Purchaser defaults on any payment due under this contract or fails to comply with any condition or provision of this contract” then, it is provided,

“Seller * * * may take immediate possession of said property without demand, etc.”

Since the contract was to be executed or performed in the Territory of Alaska, the territorial laws entered into it as effectively as if incorporated in the contract. Perforce the provisions of:

“Section 29-2-13 * * * If any buyer * * * does so sell, mortgage or otherwise dispose of his interest in them * * * in violation of the contract, the seller may retake possession of the goods and deal with them as in case of default in payment of part or all of the purchase price.”

And then it was particularly provided:

“Section 29-2-16 * * * When the buyer shall be in default in the payment of any sum due under the contract, or in the performance of any other condition (emphasis mine) which the contract requires him to perform * * *, the breach of which is by the contract expressly made a ground for the retaking of the goods, the seller may retake possession thereof.”

If the seller retakes the property perforce the provisions of said statute, he must, as a condition precedent, as provided by Section 29-2-17, give notice of his purpose to retake such property. In case of failure, however, on the part of the seller to give the appropriate notice, Section 29-2-18 applies. This section provides that, where the goods

have been seized, as provided in said Section 29-2-18,

“* * * he shall retain the goods for ten days after the retaking within the state in which they were located when retaken, during which period the buyer, upon payment or tender of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods * * * (buyer) upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred.”

Upon failure of the seller to comply with the express terms of the statutory law of Alaska, then by “Section 29-2-25 * * * the buyer may recover from the seller his actual damages, if any * * * with interest.”

3. Able counsel for the defendant say that the agreement by the original purchaser not to transfer the property precluded the plaintiff from acquiring an interest in the property. While the transfer was a violation of the obligation of the contract, it did not invalidate the assignment. By the express provisions of the contract, the defendants' remedy, because of the transfer, would be to declare a de-

fault on the contract precisely as in the case of failure to pay matured installments on the purchase price.

Quite clearly, under the contract and because of the summary action of the defendants, plaintiff is entitled to judgment for his actual damages. It was a new truck when originally sold to the original purchaser, Mahlon J. Connett. Mr. Connett made the transfer to the plaintiff late in June of 1952, less than two months after the purchase. The balance of the purchase price with interest, according to the defendants, was \$7,737.95. However, the truck, according to the testimony, had a value in California of approximately \$13,500.00. It would cost approximately \$800.00 to bring the truck to Alaska. This would give the truck a value, in Alaska, of \$14,300.00. Deducting the balance due on the truck of \$7,737.95 would leave an equity for the plaintiff in the sum of \$6,562.05.

Therefore, the plaintiff is entitled to judgment against the defendant in the sum of \$6,562.05 with interest at 6% from the 27th day of September, 1952, until paid. Moreover, the plaintiff would be entitled to attorney's fees computed upon the amount of this sum and interest according to the standards fixed under territorial practice, and to costs. Counsel for plaintiff will prepare and submit appropriate Findings of Fact and proposed Conclusions of Law, together with Judgment conformable to the Findings of Fact and Conclusions of Law.

Anchorage, Alaska, August 30, 1958.

/s/ ALBERT L. REEVES,
Visiting Judge.

[Endorsed]: Filed August 30, 1958.

[Title of District Court and Cause.]

MEMORANDUM OF OBJECTIONS TO FIND-
INGS OF FACT, CONCLUSIONS OF LAW,
AND ENTRY OF JUDGMENT

Pursuant to Rule 12(a)(2), Amended Uniform Rules of the District Court for the District of Alaska, the defendant in the above-entitled cause, by and through his attorneys, Robison & McCaskey, respectfully object to the entry of judgment presented on the grounds that the Court has awarded excessive damages under the law found by the Court to be controlling.

Assuming the defendant to be liable as found by the Court, the applicable law under the facts of the case would not entitle the plaintiff to an award in excess of one-fourth of the sum of all payments made on the truck prior to repossession by the defendant, or, one-fourth of Six Thousand Two Hundred (\$6,200.00) Dollars which would be One Thousand Five Hundred Fifty (\$1,550.00) Dollars, plus interests and costs.

The defendant specifically objects to the Court's

finding that the plaintiff had an actual loss of Six Thousand Five Hundred Sixty-two Dollars and Five Cents (\$6,562.05) when no actual damages were shown or proved. The plaintiff received a pick-up truck, a house trailer and the truck in question, plus a promise of money for the Big Timber Lodge. The plaintiff kept the pick-up truck, the house trailer, and took back Big Timber Lodge as he testified. The plaintiff neither showed nor proved any actual loss, in fact, may have profited rather than lost. How, then, can the Court award damages in excess of the provision made by the law, Section 29-2-25 A.C.L.A. 1949, which allows the plaintiff one-fourth of the payments made on the truck where actual damages are not shown.

The defendant further objects to the Court's apparent oversight in failing to consider depreciation on the truck. It had been used one season. That amounts to one year's depreciation. Trucks of the type here involved are usually depreciated on the basis of a five-year life. Accordingly, one-fifth of the truck's value had been used up when it was repossessed. Depreciation must be considered on the basis of one season's use.

The defendant respectfully requests the Court to review the question of damages as they appear in the light of the foregoing objections, and to revise the judgment to permit the recovery of that amount by the plaintiff which the law contemplates, i.e., one-fourth of the payments made on the truck.

Dated at Anchorage, Alaska, this 4th day of September, 1958.

ROBISON & McCASKEY,

By /s/ KENNETH McCASKEY,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 5, 1958.

[Title of District Court and Cause.]

MEMORANDUM IN ANSWER TO DEFENDANTS' MEMORANDUM OF OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ENTRY OF JUDGMENT

We most respectfully call the Court's attention to the fact that the Memorandum of Objections filed by the defendants is not really an objection to the Findings of Fact and Conclusions of Law, but is a repetition of the arguments advanced by the defendants after the close of the case and before the judgment was rendered. No objections as to form appear anywhere in defendants' Memorandum.

The statute referred to in the Memorandum, to wit: Section 29-2-25, does not read exactly as counsel for defendants contends. It is, therefore, set forth in full:

“Sec. 29-2-25. Recovery of damages by buyer after retaking goods.

“If the seller fails to comply with the provisions of Sections 18, 19, 20, 21 and 23 (Secs. 29-2-18, 29-2-21, 29-2-23 herein) after retaking the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest. (L. 1919, ch. 13, Par. 25, p. 38; CLA 1933, Par. 3045.)”

It is quite clear that the statute never intended to limit the recovery to one-fourth, but gave the absolute right for the recovery of the actual damages.

The remainder of the memorandum reiterates the arguments before the Court and the statement that “The defendant further objects to the Court’s apparent oversight in failing to consider depreciation on the truck. It had been used one season.” The Court covered this particular matter in his Memorandum Opinion and this was also covered in the arguments and the value of the truck was fixed as of the date that the defendants took it from the Territory of Alaska, when the truck was, according to the testimony, as good as new in every way and was worth more money in the Territory of Alaska than in the continental United States. Therefore, we can see no merit in the contention of the defendant in the Memorandum of Objections.

Respectfully submitted,

BELL, SANDERS &
TALLMAN,

By /s/ JAMES K. TALLMAN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed September 9, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came on for trial on the 4th day of August, 1958; plaintiff appeared in person and by his attorney, Bailey E. Bell, of the law firm of Bell, Sanders & Tallman; defendants appeared in person and by their attorney, Kenneth McCaskey, of the law firm of Robison & McCaskey. Each of the parties announced ready for trial and agreed to proceed at this time before the Court without a jury. Plaintiff and defendants each introduced evidence and rested their case. Arguments were had by counsel for both parties; a Trial Memorandum brief was filed by the plaintiff; defendant asked for and was given additional time to file brief, which was later filed, and Reply Brief was then filed by the plaintiff and the case was taken under advisement awaiting the filing of the briefs.

Thereafter, the Court read and considered the briefs, and being fully advised in the premises did, on the 30th day of August, 1958, file a Memorandum Opinion on Merits of Case, and from such record and memorandum, the Court makes the following, its

Findings of Fact

I.

That the controversy arose from the act of the defendants in seizing an International Dump Truck, Model 1952, in Anchorage, Alaska.

II.

That immediately upon taking possession of said dump truck, the defendants drove it out of Alaska and to the State of California.

III.

That the Conditional Sales Contract introduced and referred to throughout the trial of the case was executed in the State of California with the understanding that the truck was to be transferred to the Territory of Alaska and that following the sale of the truck, the truck was taken to Alaska by the purchaser with the knowledge and consent of the seller.

IV.

That the purchaser, Mahlon J. Connett, while the truck was being used in Alaska, assigned, for a valuable consideration, his interest in the contract to the plaintiff, Morris Killen.

V.

That under the terms of the assignment the purchaser, Mahlon J. Connett, agreed to pay all indebtedness against the truck and to clear the same completely within ninety (90) days from the date of the assignment, to wit: June 25, 1952.

VI.

That the said Connett did not make the payments as agreed to and when the next payment became due the defendants went into Alaska and without notice to the plaintiff seized the truck, transported it immediately back to California.

VII.

That the parties to the contract of purchase and sale understood and intended that the truck should be taken to and used in the Territory of Alaska, and that the performance of the contract would be carried out in Alaska.

VIII.

That the laws of the Territory of Alaska in full force and effect required that the seller must, as a condition precedent, give notice of his purpose and intention to retake said property, or in the failure to give notice then after the property has been seized he shall retain the goods (the truck) for ten (10) days after the retaking where located, all as explained in the Memorandum Opinion on Merits of Case which is herein referred to and made a part hereof by reference.

IX.

The Court further finds that the defendants, and each of them, failed to comply with the terms of the statutory law of Alaska and improperly took said truck out of the Territory of Alaska immediately and without waiting the ten (10) days as provided by law; has kept and used said truck since taking it and later sold it.

X.

That the truck was new and in Alaska was of the reasonable value of \$14,300.00 at the time the defendants took it from the plaintiff and out of Alaska, and the balance due on the contract was \$7,737.95, leaving the value of the plaintiff's equity in said truck in the sum of \$6,562.05, which was the amount of plaintiff's actual damages suffered as of September 27, 1952.

XI.

The Court further finds that the plaintiff is entitled to judgment for his actual damages suffered, and fixes that amount at \$6,562.05, plus interest at six per cent (6%) per annum from the 27th day of September, 1952, until paid, which amounts to \$2,362.32 if paid on September 27, 1958, plus all costs of this action including an attorney's fee for plaintiff as provided by the Rules of the District Court of Alaska, and by said Rules plaintiff is entitled to recover, a sum to assist in the payment of his attorney's fees in the trial of this case, to

the extent of \$678.48, and from such findings of fact, the Court makes the following its

Conclusions of Law

I.

That the laws of the Territory of Alaska govern in this case.

II.

That plaintiff is entitled to judgment as set out above in the findings of fact.

III.

That the plaintiff is hereby directed to prepare, serve and tender to the Court a judgment in compliance with the Memorandum Opinion on Merits of the Case and of the above findings of fact.

Dated this 18th day of September, 1958.

/s/ ALBERT L. REEVES,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed September 24, 1958.

In the District Court for the District of Alaska,
Third Division

No. A-9214

MORRIS KILLEN,

Plaintiff,

vs.

CHARLES COOK, CHARLES E. COOK, JR.,
CHARLES E. COOK, III, d/b/a COOK &
SONS EQUIPMENT COMPANY, INC., of
the State of California,

Defendants.

JUDGMENT

This matter came on for trial on the 4th day of August, 1958; plaintiff appeared in person and by his attorney, Bailey E. Bell, of the law firm of Bell, Sanders & Tallman, and the defendants appeared in person and by their attorney, Kenneth McCaskey, of the law firm of Robison & McCaskey; both parties announced ready for trial; evidence was admitted, case rested, arguments had, and the case taken under advisement pending the filing of briefs. Thereafter, briefs being filed, the Court did, on the 30th day of August, 1958, file a written Memorandum Opinion on Merits of Case and directed the plaintiff to prepare and submit appropriate findings of fact and proposed conclusions of law, together with judgment conformable to the findings and conclusions set forth in the Memorandum Opinion above referred to.

Thereafter, findings of fact and conclusions of law were prepared, served and submitted to the Court, who affirmed them and found them correct in all matters, signed them and caused them to be filed in this case.

Now, therefore, it is hereby Considered, Ordered, Adjudged and Decreed that the plaintiff have and he is hereby given judgment against the defendants and each of them for the sum of Six Thousand Five Hundred Sixty-two Dollars and Five Cents (\$6,562.05), plus Two Thousand Three Hundred Sixty-two Dollars and Thirty-two Cents (\$2,362.32) interest, and Six Hundred Seventy-eight Dollars and Forty-eight Cents (\$678.48) as attorney's fees, making a total of said judgment as of this date to the extent of Nine Thousand Six Hundred Two Dollars and Eighty-five Cents (\$9,602.85), plus all costs of this action to be fixed by the Clerk of this Court and inserted herein to the extent of \$289.40. This judgment shall bear interest at six per cent (6%) per annum after September 27, 1958, until paid.

For all of which let execution issue.

Dated this 18th day of September, 1958.

/s/ ALBERT L. REEVES,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered September 24, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Cook and Sons Equipment, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment of the District Court for the Third Judicial Division, District of Alaska, granting judgment in favor of the plaintiff and against the defendant, said judgment having been filed and entered in the above-entitled cause on the 24th day of September, 1958.

Dated at Anchorage, Alaska, this 17th day of October, 1958.

ROBISON & McCASKEY,

By /s/ KENNETH McCASKEY,
Attorneys for Apellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 17, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant, Cook and Sons Equipment Company, Inc., herewith presents the points upon which it claims the Court erred:

1. In refusing to dismiss the action as to the defendants Charles E. Cook, Jr., and Charles E. Cook, III.

2. In finding that the truck was new and of the actual value of \$14,300.00 at the time defendant repossessed it.

3. In finding that plaintiff's equity in the truck was \$6,562.05.

4. In finding that plaintiff suffered actual damages.

5. In holding that plaintiff suffered actual damages of \$6,562.02.

6. In entering judgment for plaintiff in the amount of \$9,602.85.

ROBINSON & McCASKEY,

By /s/ KENNETH McCASKEY,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed November 3, 1958.

In the District Court for the District of Alaska,
Third Division
No. A-9214

MORRIS KILLEN,

Plaintiff,

vs.

CHARLES COOK; and CHARLES COOK, JR.,
dba COOK & SONS EQUIPMENT COM-
PANY, in the State of California,

Defendants.

TRANSCRIPT OF EXCERPT
OF PROCEEDINGS

On Monday, August 4, 1958, in open court at Anchorage, Alaska, before the Honorable Albert L. Reeves, U. S. District Judge, the following proceedings were had:

* * *

The Court: You may proceed with your witness, Mr. Bell.

Mr. Bell: I will call Mr. Charles Cook.

CHARLES E. COOK, JR.

called as an adverse witness for and on behalf of the plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Bell:

Q. Is this Mr. Cook sitting here, the senior Mr. Cook, or is it the junior?

A. I am the oldest of those two.

(Testimony of Charles E. Cook, Jr.)

Q. Your Honor, I am calling Mr. Cook as an adverse witness for the plaintiff, under our Federal Rules.

The Court: Yes, I understand that, Mr. Bell.

Q. Now, Mr. Cook, you are one of the defendants in this action and I'll ask you to explain for the record if you are junior or senior, will you do that?

A. Yes, I am Charles E. Cook, Sr.; the other defendant is or should be named Charles E. Cook the Third.

Q. He is your son, is that right?

A. Yes, sir.

Q. Was he in the Territory of Alaska at the time the car was taken? A. No, sir.

Q. Who was with you at that time?

A. A local garage man whose name I do not remember.

Q. What time of day was it that you repossessed or took possession of this truck?

A. In the afternoon; I don't recall the time of day.

Q. Was it dark?

A. No, sir, it was light.

Q. Did—— [2*]

The Court: Was it on September 27 that you took possession, that the car was taken?

Q. Mr. Cook, did you—was it September 27 that you took possession?

(Testimony of Charles E. Cook, Jr.)

A. Well, actually, I don't remember exactly, but that is close to the date.

Q. And when you took possession you drove it out over the Highway and cleared through Tok Junction?

A. I cleared through Tok; I have no record; I didn't keep any notes.

Q. Was it early in the morning following the time that you took it?

A. Yes, I cleared through early in the morning.

Q. Would you tell the Court approximately what hour?

A. Well, it seems to me that I had to wait for the Border to open, whatever the time was that I cleared through.

Q. You were there when they opened?

A. Yes, sir.

Q. Now then, you went on through and cleared through Dry Creek, did you not?

A. Where is that?

Q. About one hundred miles or one hundred and fifty miles beyond Tok Junction.

A. Oh, yes, I am sorry, that is where I had to wait for them to open at the Canadian Border. [3]

Q. You passed through Tok Junction in the very early hours following the 27th?

A. Probably did; I did at the Canadian Border.

Q. You did that on the 28th if you took the truck on the 27th.

A. I probably—I presume so, I went right on.

Q. As you remember it, the 27th was the date

(Testimony of Charles E. Cook, Jr.)

you took the truck? A. Approximately, yes.

Q. Did you ever see Morris Killen before you took the truck? A. No, sir.

Q. Did you give any written notice to anybody that you were intending to take it?

A. No, sir.

Q. How long had you been in the Territory when you took the truck?

A. Well, very few days, two or three; I don't just remember when I arrived.

Q. Did you fly up?

A. Yes, and landed at Anchorage.

Q. Was anyone with you?

A. No, sir, I flew alone.

Q. Is your answer true that you are an officer of Cook and Sons Equipment? [4]

A. If the answer says that; it is not quite right, it is Charles Cook and Charles Cook, Jr.; Cook and Sons Equipment Company, Inc. I am an officer.

Q. Are you president? A. I am.

Q. Were you at that time? A. I was.

Mr. Bell: I think that is all.

Mr. McCaskey: If I may be permitted one or two questions, your Honor?

The Court: You may, yes.

(Testimony of Charles E. Cook, Jr.)

Cross-Examination

By Mr. McCaskey:

Q. Mr. Cook, there has been some question here as to the time that you crossed the Border. My only concern is when did you leave Anchorage?

A. Well, I left Anchorage in the afternoon, almost immediately after repossessing the truck.

Q. Did you have any reason to stay around Anchorage? A. No, sir.

Mr. McCaskey: I have no further questions, thank you, Mr. Cook.

Mr. Bell: That is all, Mr. Cook. Now, will Morris Killen come forward, please. Step over here to be sworn. [5]

MORRIS KILLEN

called as a witness for and on behalf of the plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Bell:

Q. Mr. Killen, please state for the record your full name? A. Morris Killen.

Q. Do you have a middle initial? A. No.

Q. Were you on the 25th day of June and immediately thereafter, or rather, immediately prior thereto operating a lodge, the Big Timber Lodge?

A. I was.

Q. Did you have it stocked?

A. I had quite a stock in there, yes.

(Testimony of Morris Killen.)

Q. A store, a restaurant and a night place?

A. A bar.

Q. A place to stay over night, and what else?
Did you have gasoline?

A. Yes, I had gasoline.

Q. What else?

A. I had gasoline; I had a store, a cafe with regular family-served meals, a bar; I had approximately thirty-five regular boarders, which were truck drivers on the road. It was quite a nice income. [6]

Q. Did you on the 25th day of June, 1952, enter into a contract with Mahlon Connett? That is spelled M-a-h-l-o-n J. C-o-n-n-e-t-t. A. I did.

Q. I'll ask you to examine this paper and see if that is the contract you entered into with him?

A. It is.

Q. We now offer this contract in evidence, Your Honor.

The Court: That is the contract with Connett?

Q. Yes, your Honor.

Mr. McCaskey: May I have a moment to examine it, please?

The Court: Yes.

(Mr. McCaskey examined the contract referred to.)

Mr. McCaskey: I have no objection, Your Honor.

The Court: That contract was for June 25, was it?

(Testimony of Morris Killen.)

Mr. Bell: Yes, I believe that is the date, Your Honor.

The Court: That is Plaintiff's Exhibit 1.

Mr. Bell: Your Honor, at this time, with your indulgence, I would appreciate reading a portion of the contract to you?

The Court: Well, yes. [7]

Mr. McCaskey: Well, I think in the interest of time, the paper has just been introduced and Your Honor is well versed in the art of reading it.

The Court: I think, at least, he should—Counsel has the right to show some proof, to read some portion and make it understandable, of course.

Mr. Bell: Your Honor, I am going to read only that portion of the contract under Paragraph V and then you will have it before you and counsel may use it also. It is agreed that counsel may use any part of it in his argument and that I may use any part of it.

Mr. McCaskey: All right.

(Whereupon Mr. Bell read Par. V of the contract dated June 25, 1952, entered into with Mahlon Connett.)

Mr. Bell: Now, Your Honor, that is the portion I wanted to call to your attention.

The Court: You may then proceed.

Q. (By Mr. Bell): Mr. Killen, did you get the truck? A. I did.

Q. Did——

(Testimony of Morris Killen.)

Mr. McCaskey: Your Honor, I take it that the contract is or will be Plaintiff's Exhibit No. 1?

The Court: Yes, it is marked No. 1.

Q. (By Mr. Bell): What kind of a truck was it, Mr. Killen? [8]

A. Twin-screw LL-190; the truck was absolutely perfect.

Q. Was it new?

A. Yes, it was a new truck, with the exception that Mr. Connett told me that he drove it up from Los Angeles to Fairbanks, and Fairbanks down to Big Timber; the truck had worked one week when I dealt with Mr. Connett and his family, his wife; I made a trade with them for the property up there for the truck because I was intending to go back into the construction business.

Q. Had you been in the dirt-moving business for some time in Alaska before you acquired Big Timber?

A. I came to Alaska in 1947, and in 1948 I went into construction, excavation, which I was in under one of three contracts in Anchorage at that time.

Q. Did you have other earth-moving equipment at that time? A. I did not.

Q. Now, did you turn Big Timber over to this man, Connett?

A. Yes, I turned it over immediately after the papers were drawn up; after I received the papers, I went right back and turned the lodge over to him, including all the stock, the blankets, just

(Testimony of Morris Killen.)

everything. We had accommodations for thirty-five people up there.

Q. Was the \$15,000.00 that you were allowed on the purchase price of Big Timber, in your opinion, the reasonable value of the chattel property that you received at that [9] time?

A. Yes, I feel it was; I got a good deal at \$15,000.

Q. Now, I will ask you if you were thoroughly familiar with the value of this truck in Alaska on or about the 25th day of June, 1952?

A. Well, I felt so at the time.

Q. I asked, Mr. Killen, if you were thoroughly familiar with the value? A. Yes.

Mr. McCaskey: I object to his testimony as to the value; there is no showing that he is an expert on this subject.

The Court: Well, it will take very little time to make him an expert; he had said he had moving equipment and I assume the truck had something to do with that.

Mr. Bell: Yes, it was a dump truck.

The Court: Very well.

Mr. Bell: Mr. Killen, tell the Court what experience you had had in earth-moving business.

A. Well, I have had into the hundreds and thousands of dollars worth of contracts in Alaska; I have built several air fields in Alaska; I have lost a few fingers with equipment; I am a pretty fair mechanic; I think I know equipment; I know the earth out there from moving dirt. [10]

(Testimony of Morris Killen.)

Q. Have you owned a great deal of equipment for earth moving in Alaska? A. I have.

Q. Have you bought and sold a great deal of equipment? A. I have.

Q. Do you know the reasonable market value of this dump truck, that you just described, in Alaska in 1952, on the 25th of June or on the 27th day of September, the day it is conceded that it was taken in 1952? Do you know the value of it?

A. My estimate of it, the value would be \$15,000.00 with a spare tire and the stuff that was in the truck.

Q. Mr. Killen, have you since this deal, since that car was taken, have you gone into the matter to see whether the conditional sales contract provided for any spare equipment of any kind?

A. No, I haven't. Mr. Connett told me when I bought the truck, or traded for the truck that the tires—it had two new tires, tubes and wheels that had never been on the ground; he said he bought those outright and that they were not on no conditional sales contract with the bank.

Q. Now, will you tell the Court whether or not you know the cost and reasonable value of those two wheels, tubes, and tires for this large truck at that time? [11]

A. At that time they were worth \$400.00 to \$450.00, tires, tubes, and wheels.

Q. Now, did you have any other equipment in this truck?

A. Yes, I had some tools; I can't recall the

(Testimony of Morris Killen.)

amount of the tools; I had quite a few tools with my personal tools and stuff I had brought back from Big Timber.

Q. Those were not regular tools that came with the truck?

A. No, sir, didn't go with the truck, whatsoever.

Q. Can you tell the Court the value of those tools that disappeared?

A. That I would hate to say, because I can't recall definitely just how many tools I had in there. But just as a guess, I would say \$15.00 to \$25.00 worth of hand-tools were in there.

Q. Mr. Killen, before, or rather after you purchased—after you acquired this truck by this contract that we have just introduced in evidence, did you and your wife go out of town?

A. We did shortly after; I can't recall definitely the date that I came back; I always stack my equipment and winterize it and make other arrangements. We had been working up there over a year, day and night. We went Outside, but I can't recall the date for sure.

Q. I believe you stated that you stacked your equipment for the winter and winterized it. Will you tell the [12] Court what you mean as a contractor, when you—what do you mean by "stacking" your equipment?

A. Well, that is customary procedure for all contractors to winterize and stack their equipment in as a small place, as small a place as you can. Usually you take the equipment out early and you

(Testimony of Morris Killen.)

have to dig it out, because you usually take it out and service it before the snow is off the ground and get it ready for the next season. I stacked my equipment and got it as close in one bunch as I could.

Q. Did you own a home in Anchorage at that time?

A. Yes, I had quite a bit of equipment and stuff and I had to stack it close to get back and forth in the lot.

Q. Would you tell His Honor just how you put this particular truck on the home property lot?

A. Well, would I — could I draw a picture of it?

Q. Yes, let's have a picture of it. It may be better to have him draw it right on the blackboard. Can you draw, Mr. Killen?

A. Not much, but I can try.

Q. Let the record show at this time that I am requesting Mr. Morris Killen to draw on the blackboard an illustration of his home, his house, and the way he stacked the equipment in that vicinity.

A. This will be the alley. (Indicating.) [13]

Q. You are marking it "alley," is that right?

A. Yes, that's right. Now, right in this area here (indicating), is a D-6 Cat.

Q. Mark it "D-6."

A. The truck in dispute was pulled in and parked right here (indicating), and my pickup was parked here, there was a greenhouse here; this was my dog pen; this was the corner of my house over here. (Indicating.)

(Testimony of Morris Killen.)

Q. Now, will you draw the truck for us in detail, the way it was setting.

A. It was setting length-way; my pickup was setting length-way here. (Indicating.)

Q. Now, will you please draw or mark cross marks for where the truck was setting? Draw X's or cross marks in the place where it set in so it will be clear to distinguish from other things there.

A. Yes. (Mr. Killen then drew the X's as requested.)

Q. Now, as I understand it, you have made an "X" where this particular truck was sitting?

A. Yes, that's right.

Q. What is the object in the back or below it on the blackboard? A. That is my dog pen.

Q. Will you put a "D" or write "dog pen"?

A. Yes. [14]

Q. Now, will you please show the Court where your pickup truck was sitting?

A. It was sitting right here. (Indicating.)

Q. Now, this, as I understand it, it is back, directly back of the house and to the right side of the big truck? A. Right.

Q. Now, did you have other equipment on the yard there?

A. Nothing but the Cat, here. (Indicating.) I had a greenhouse here and a bunch of soil pipe stacked in here; and I had pipe and parts over here. (Indicating.)

Q. Now, was there any fence on that property?

(Testimony of Morris Killen.)

A. Yes, this is the fence; it's a small lot. The fence is here and the corner lot here. (Indicating.)

Q. The corner lot you don't own?

A. No sir. The house was sitting here on the corner.

Q. Your the second from the corner to the north on "K" Street? A. That's right.

Q. How big is that lot, Morris?

A. I think it was a 60 ft. lot; I can't be sure.

Q. How long? Do you know?

A. One hundred feet, I believe it was; I had a very small yard.

Q. Now, after you came home, what condition did you find your fence and house in?

A. Well, I was back in Alaska after the truck was taken. [15] Mr. Bell had called me at my mother-in-law's and that was out of San Antonio, Texas. I got the call between twelve and one o'clock; I was advised by Mr. Bell to come up the Highway and try to stop the truck, because I wanted that truck; I needed it, and I was in the position, even if Mr. Connett had not paid, to pay; if I had been notified I would have gladly paid for the truck, that is the balance due on it.

Q. When you came back to Anchorage what did you find in the way of marks on your house and so forth?

A. I found that my pickup had been pulled out sideways; I had to replace one wheel; my fence was knocked down; the corner of my house was

(Testimony of Morris Killen.)

torn; I had to repair the corner of the house, and I had to repair the fence.

Q. Now, Mr. Killen, you may come back to the stand.

(Mr. Killen returned from the blackboard to the witness stand.)

Q. Mr. Killen, I believe that you stated that the truck had a definite value for a new truck of that kind, a definite value here in Anchorage or Alaska? A. Yes, sir.

Q. I forgot what you said?

A. \$15,000.00 would be my price on it.

Q. Do you have anything against that truck other than the \$7500.00 that was mentioned in the contract; did you [16] have any other incumbrance of any kind?

A. I did not. I did not know who the truck had been purchased from; I did know that the paper read \$8500.00 and something, but I am not familiar with it; the pay-off would have been about \$7500.00, the way I figured; and the way Connett would pay it off would have been within the ninety days, when the payment came due.

Q. Now, did you see in Mr. Connett's possession the receipts for three months' payment that opposing counsel has stated were made by Mr. Connett?

A. I did see them.

Q. Do you remember approximately how much that amounted to?

A. Something over, I'm quite sure, over \$1200.00; four hundred and some dollars per month.

(Testimony of Morris Killen.)

Q. And there were three of those payments made? A. Yes.

Q. So then, Mr. Killen, if the blance due, as counsel for the defendant has stated, was about eight thousand dollars, then on that you saw receipts for approximately \$1200.00?

A. Approximately \$1200.00, yes.

Q. Mr. Killen, did you—were you able, willing and ready to pay the balance due on the conditional sales contract if you had known that Mr. Connett defaulted on the payment? [17]

A. I would have gladly paid it and tired to get reimbursed from Mr. Connett.

Q. As I understand it, there was nothing due until sometime in September on the truck.

A. That was the way I understood it.

Q. Can you remember the day, the date, that you were called on the telephone by me while you were in Texas?

A. I can't; I couldn't give you a definite date. It was in the latter part of September.

Q. Do you have any recollection, as you informed me this morning that it was, you thought it was the 20th of September, do you have any recollection or any way to fix that?

A. Not without going back to Texas.

Q. Those were your people living there?

A. Yes. To get an exact date—that is my opinion.

Q. Your best memory then is that it was the 20th? A. Yes.

(Testimony of Morris Killen.)

Q. Have you ever been notified by any one that there was any payment past due on the truck up to the night that I called you in Texas?

A. By no one, no.

Q. Then, as I understand it, your testimony is that you had no knowledge of any payment being due and you received no notice of any payment being due, up until I called [18] you, approximately on the 20th of September?

A. No, sir, I did not.

Mr. Bell: You may take the witness.

Mr. McCaskey: May I ask the Court for the use of Exhibit No. 1.

The Court: Yes. That is not the original contract of sale?

Mr. McCaskey: No, it is the contract between Mr. Connett and the plaintiff, Mr. Killen, Your Honor.

The Court: Yes.

Cross-Examination

By Mr. McCaskey:

Q. Mr. Killen, in your course of testimony, did you or did you not say that you knew at the time of making that agreement with Mr. Connett that there was \$8500.00 due on the truck?

A. That was my understanding.

Q. How did you know that?

A. Because he told me that when we entered into the contract.

(Testimony of Morris Killen.)

Q. Did you or did you not say you saw three receipts?

A. Yes, he showed me either one or three covering the ninety days; he showed me receipts where he had paid for ninety days in advance and he asked for ninety days to pay off the truck and I granted to that, to that effect and draw it accordingly in the contract.

Q. You knew that that money was owed on this truck to the [19] Bank of America?

A. I did.

Q. There was no doubt in your mind that the truck had not been paid for?

A. None whatever.

Q. If I read your agreement correctly, Mr. Killen was to make the payments?

A. Who said that?

Q. Mr. Connett rather was to make the payments to the Bank of America?

A. Yes, he was to pay off the bank, the Bank of America and give me clear title under our agreement.

Q. Now, what kind of title did he give you?

A. He didn't give me anything only old papers that he had on the truck.

Q. Conditional sales contract?

A. No, I don't have any sales contract whatever: all I had was license receipt, I believe it was.

Q. Did it show the lien against the truck?

A. Yes.

(Testimony of Morris Killen.)

Q. So the title, on the title you actually took had recorded on it the lien against the truck?

A. Right, to the Bank of America.

Q. And did you have that today with you?

A. Yes, I think so. [20]

Q. Does your attorney have it?

A. Yes, I think Mr. Bell has that paper.

Q. Does that indicate the amount of the lien?

A. How's that?

Q. Did that indicate the amount of the lien?

A. Yes, that is why we arrived at the pay-off of \$7500.00.

Q. Now, Mr. Killen, as a purchaser, knowing full well that there was a lien and conditional sales contract covering that piece of equipment, did you make any inquiries of Mr. Connett as to his right to transfer it, the truck, to you, even under those conditions? A. No, I didn't. I——

Q. That is all; that is the only question I asked you, if you made any inquiries of him.

Now, Mr. Killen, when this transaction did not work out, was not carried through, what happened to the Big Timber Lodge?

Mr. Bell: I object, the question is irrelevant, and immaterial, Your Honor.

The Court: Unless you connect it up some way, counsel; if you do, I will have no objections.

Mr. McCaskey: The plaintiff's attorney, Your Honor, went into the apparent value of the Big Timber Lodge to the plaintiff.

(Testimony of Morris Killen.)

The Court: Was that question asked, or [21] was it stated in the opening statement?

Mr. McCaskey: Not in so many round figures, I believe he asked if he was running a profitable business.

The Court: Well, I have no objection, but the only question—the only issue is whether or not Cook improperly took this truck.

Mr. McCaskey: I think that is true, Your Honor, but in so far as equity, earlier mentioned by the plaintiff's attorney——

The Court: Do you think that would have an influence on dealing with the truck?

Mr. McCaskey: Well, I will let it pass for now.

The Court: Well, if you think so, I want you to feel at liberty to go ahead.

Mr. McCaskey: I think the Court should be informed of what happened to the consideration in this bargain, which fell through, of course some consideration was the lodge.

Mr. Bell: That would be Mr. Connett's——

The Court: Well, it would have to be brief, he indulged in the conversation.

Mr. McCaskey: Well, am I allowed to question?

The Court: Yes.

Q. (By Mr. McCaskey): I will ask you just briefly, did you go back into the [22] Big Timber Lodge?

A. I took what was left; when I came back I had no stock; I had no blankets; I had no windows, or anything else; all I had left of Big Timber

(Testimony of Morris Killen.)

was a shell up there and I didn't operate Big Timber again.

Q. But you did default Mr. Connett on his contract, did you not?

A. Not lately; by the law he wasn't there; he is gone.

Q. Is it a fair statement to say that you returned the condition of Big Timber Lodge to status quo in so far as you could? In so far as conditions permitted after the truck was taken, you did attempt to repossess the Lodge up there?

A. Oh, yes.

Q. And did you actually move back into it?

A. I did not.

Q. But did some agent move back into it?

The Court: Did this occur after the truck was taken?

Mr. Bell: All of it, Your Honor; I don't think it is competent.

Q. (By Mr. McCaskey): I believe you stated in the course of your testimony, did you not, Mr. Killen, that you would have paid for this truck, had you known of the default in installments? [23]

A. I would have, yes.

Q. You knew, did you not, Mr. Killen, that the Bank of America held this lien on the truck?

A. I think I have repeated that I did.

Q. Did you at any time contact the Bank of America and tell them you had the truck and that if Mr. Connett did not make the payments, you would see that they were made?

(Testimony of Morris Killen.)

A. I did not.

Q. Did you, in fact, attempt to contact the Bank?

A. I did not for the reasons I have already said. I shortly went Outside, and I did not have any doubt in my mind that Mr. Connett wouldn't pay the truck off for the investment he had already put down.

Q. I didn't get that, what did you say?

A. The investment that he had put down on Big Timber Lodge; I'd no idea he wouldn't fulfill the contract and agreement he made with me.

Q. Just a moment, please. May I have a minute, Your Honor?

The Court: Yes.

Mr. McCaskey: That is all the questions we have on cross-examination, Your Honor.

Mr. Bell: I have just one question.

Redirect Examination

By Mr. Bell:

Q. Mr. Killen, did you ever have any knowledge that a man [24] by the name of Cook, or any company by the name of Cook had any interest whatsoever in this deal? A. I did not.

Q. The first that you knew that Mr. Cook or someone by the name of Cook claimed some interest was when I telephoned you to come up from Texas? A. That is right.

Q. As I understand it, you stated that you had

(Testimony of Morris Killen.)

the opinion always that the Bank of America either had a mortgage or a lien on the truck?

A. I did, yes.

Q. I believe you stated that the discussion was that the original balance was something like \$8500?

A. Yes.

Q. And that you had seen receipts that amounted to approximately \$1200.00? A. Right.

Q. That is how you arrived at the figure of \$7500.00? A. Right.

Q. That is all.

Mr. McCaskey: May I be permitted one more question?

The Court: Yes.

Recross-Examination

By Mr. McCaskey:

Q. Mr. Killen, did you ever, after you learned the truck [25] was gone, contact the defendant, Mr. Cook, or inform him? A. No.

Q. Did you inform him that you would pay the balance on the truck? Did you inform him that you would—did you request him to return the truck to you?

Mr. Bell: I object, it's irrelevant and immaterial, what happened after the deal had taken place.

The Court: Well, it might have bearing on the question, as to what the defendant said. Objection overruled; he may answer.

A. Will you state your question again?

(Testimony of Morris Killen.)

Q. Did you at any time after you learned that the truck was taken contact or attempt to contact the defendant through Mr. Bell, Defendant Cook and Sons, and offer to pay the balance? Did you?

A. No, I didn't know Cook owned it.

Mr. McCaskey: Thank you. That is all I have.

Mr. Bell: I have one more question, Your Honor.

Redirect Examination

By Mr. Bell:

Q. Did you or did you not try to find the people who had your truck on the Alaska Highway when you were driving back to Alaska? [26]

A. I did.

Q. Did you make a diligent effort to find them?

A. Yes, I ruined my vacation and spent several hundrer dollars coming back up the Highway trying to find that truck, to get hold of it to stop it.

Q. You couldn't find it?

A. I couldn't, no.

Mr. Bell: That is all, thank you.

Mr. McCaskey: I have no further questions.

(Mr. Bob H. Killen, Dovie Killen, and Virgil Fey were next called by the plaintiff and testified.)

(Plaintiff rests.)

Mr. McCaskey: I wish to call Charles Cook, Your Honor.

CHARLES E. COOK

resumes the stand having been sworn in previously as an adverse witness.

Direct Examination

By Mr. McCaskey:

Q. You were sworn in this morning?

A. Yes.

Q. State your full name, please?

A. Charles E. Cook, Jr.

Q. You have been in court this morning in this hearing and you have heard the testimony, you heard everything stated on the witness stand? [27]

A. I have.

Q. Is it true, Mr. Cook, that the truck in question here was a 1952, new International, six-cylinder, three-axle dump truck? A. It's true.

Q. I show you a copy of what purports to be an automobile conditional sales contract, Mr. Cook, and ask you if that is the contract entered into between your company and the person known to be Mahlon Connett?

A. That is correct, it is the contract.

Q. And that contract was entered into on what date? A. Seventh of May, 1952.

The Court: Did you say May 7, 1952?

A. Yes.

Q. May I have it a moment; I want to show it to counsel so he may examine it; I intend to introduce it.

The Court: Has it been marked for identification?

(Testimony of Charles E. Cook, Jr.)

Q. No, Your Honor, I will hand it for marking and then request the use of it again.

(Mr. McCaskey hands the document to Mr. Bell.)

Mr. Bell: We have no objection, Your Honor; We have no objection to the authenticity of the contract; It is apparently a copy and not an original, but we'll not object; it is not binding upon Mr. Killen since it is not filed and recorded in Alaska. [28]

Mr. McCaskey: May I enter it as Defendant's A?

The Court: Yes.

Q. (By Mr. McCaskey): Mr. Cook, I will hand you the contract and ask you that in so far as you knew, or know, is that the original of the contract entered into between you and Mr. Connett?

A. Yes, that is the original.

Q. How do you know that?

A. Well, I was present when it was made and I signed it as president of Cook and Sons, Inc., on May 7, 1952, which date it bears, and I was present when Mahlon J. Connett signed it. It is the original on the typewriter and I observed all those things: I know it is the original.

Q. Are you reasonably sure?

A. Yes, sir.

Q. Was it deposited with the Bank of America?

A. It was sold and assigned to them.

Q. There is indication of that on the contract,

(Testimony of Charles E. Cook, Jr.)

is there not? A. Yes, on the reverse side.

Q. Well, if it was sold and assigned to the Bank of America, how did you get possession of it? [29]

A. When—I sold it with recourse and when I had to pay it off, I took another reassignment from the Bank of America, which shows on the reverse side of the contract.

Q. Mr. Cook, would you relate for the Court the transaction entered into between you and Mr. Connett regarding the purchase of this truck?

Mr. Bell: I object to that; it is irrelevant and immaterial.

The Court: Of course, all negotiations would be merged into the contract.

Mr. McCaskey: Would you read from the contract the provisions of installments?

A. Yes. "Par. IX. Said contract balance is payable as follows: Balance, \$9,685.64," which is indicated on the—on line 8 of the contract, "and the contract balance is payable at \$403.76 on June 20, 1952, and twenty-three equal successive months, installments of \$403.56, beginning July 20, 1952, and continuing until paid."

Q. Did you know that Mr. Connett was working in Alaska at the time he purchased this property, know it was for operation in Alaska?

A. He was not operating in Alaska; I knew he was coming to Alaska and bringing the truck with him.

Q. Now, did he request permission of you or of the bank to bring this truck to Alaska? [30]

(Testimony of Charles E. Cook, Jr.)

A. Well, he requested permission of me; I told him, of course, but that we would have to talk to the bank; actually it was the bank that gave the written permission to bring the truck to Alaska.

Q. Were there any conditions on that permission? Do you recall anything about accelerated payments?

Mr. Bell: I object—Oh, I'll withdraw, go ahead.

A. The bank insisted that he make three payments before he left California to evidence good faith and they thought that would give him time to get a job, which he did, and apparently Mr. Killen saw the receipts, for whether there were three or one, they were made directly to the bank.

Q. I see. Now, how did you learn that Mr. Connett had traded or gotten rid of the truck in some manner? How did that knowledge come to you?

A. By word of mouth from a party who came down from Alaska sometime in the middle of September.

Q. That was about the middle of September, 1952?

A. That is correct.

Q. Did the bank inform you about any default in payments?

Mr. Bell: I object to information or the conversation with the bank, Your Honor.

The Court: I am sorry, my attention was [31] called to something else.

Mr. McCaskey: Your Honor, the question of the heresay rule—I had asked Mr. Cook whether it was

(Testimony of Charles E. Cook, Jr.)

about the middle of September when he was informed that Mr. Connett had gotten rid of the truck, whether the bank informed him that the September payment or some of the payments or any of the payments were overdue?

Mr. Bell: Oh, I will withdraw my objection.

The Court: Oh, very well.

Q. (By Mr. McCaskey): Well, Mr. Cook, you many answer the question.

A. Well, prior to September 20, it wasn't due; it wasn't due until September 20, so there was no reason for them to tell me that it wasn't paid. I came to Alaska about that time and then conferred with them later.

Q. About what time did you come to Alaska?

A. On or about the 20th or after; I am not just sure.

Q. Upon arriving in Alaska did you look up Mr. Connett?

A. Yes.

Q. Where?

A. Big Timber Lodge.

Q. Did you ask him what he was going to do about the truck?

A. I did.

Q. Did——

Mr. Bell: I would object to any [32] conversation he had with Mr. Connett.

Mr. McCaskey: I have not asked him what Mr. Connett said, but what the witness, himself, said.

Mr. Bell: I object on the grounds that our client was not present; Mr. Killen was not present; it would not be binding upon him what Cook and Connett said.

(Testimony of Charles E. Cook, Jr.)

Mr. McCaskey: I have not asked him what Mr. Connett said, but what this witness said to Connett.

The Court: Of course, anything he may have said in the presence of the plaintiff would be binding upon him; the statement he might now make is not binding because Mr. Connet is not a party here.

Mr. McCaskey: Your Honor, I am asking this witness what he asked Mr. Connett.

The Court: Yes, on those grounds that would be hearsay testimony. If he made a statement to Mr. Killen, then you would have a right to ask him what he said.

Mr. McCaskey: But, my question is what this witness said, not what Mr. Connett said.

The Court: It would be outside the courtroom, somebody here, it would not be binding, whatever he said to Mr. Connett would not be binding.

Mr. McCaskey: All right, your Honor, I will go to another matter at this time. [33]

Q. (By Mr. McCaskey): Mr. Cook, did you make demand on Mr. Connett for payment?

Mr. Bell: I object to that as being irrelevant and immaterial hearsay matter, happening out of the presence of the plaintiff.

The Court: Well, did he know that the truck had been transferred?

Mr. McCaskey: Mr. Cook?

The Court: Yes.

Mr. McCaskey: That was his information, yes.

(Testimony of Charles E. Cook, Jr.)

The Court: Mr. Connett would no longer be liable for it?

Mr. McCaskey: No, he knew only that Mr. Connett had gotten rid of the truck.

The Court: Of course, Mr. Killen said his contract was that Mr. Connett would pay the balance due on the truck, now if that is the contract, I think this witness has a right to ask him about payment, because it was his obligation, under the evidence here, to pay.

Mr. McCaskey: I think so, your Honor.

The Court: You may ask him, I take it, subject to objection, and I will look into it.

Q. (By Mr. McCaskey): Perhaps I can—did you secure any satisfaction from [34] Mr. Connett?

A. No, sir, I did not.

Q. That was on or about September 20, 1952?

A. Sometime after that, I believe; on or about that, I believe, I'm not sure of the exact date.

Q. What was your subsequent action after seeing Mr. Connett at Big Timber Lodge?

A. I came back to Anchorage and went to the home of Mr. Killen.

Q. Was anyone with you?

A. No, sir, not the first time; I went there twice, the first time alone.

Q. And when you went there did you see the Killen boy? A. I did. I talked to him.

Q. What was that conversation, if you recall, as well as you can remember?

A. I introduced myself and told him who I was,

(Testimony of Charles E. Cook, Jr.)

Charles Cook, president of Cook and Sons, Inc., the people who sold the International truck parked in their back yard to Mr. Connett. I said I had come to get the truck or the money.

Q. And was—what was the answer?

A. His answer was that his father was out in the States somewhere and his mother was also out there in the States; he said his father wanted no one using the truck and had told him no one was to touch it. [35]

Q. No one was to get the truck? Which truck?

A. This particular International truck, or touch it.

Q. Did he indicate to you at all that his father felt that some one would be after the truck?

Mr. Bell: I object, your Honor, that question calls for a conclusion from the witness.

The Court: He may say what was said, one of the parties was there, that is the defendant was there.

Mr. Bell: That is right, your Honor, but he said, "Did he indicate" something, and that would have been a conclusion.

Mr. McCaskey: Perhaps I can rephrase the question and it will not be objectionable.

Q. (By Mr. McCaskey): Did the Killen boy infer that he had been expecting someone to come after the truck?

Mr. Bell: I object to that, your Honor.

The Court: Well, counsel—

(Testimony of Charles E. Cook, Jr.)

Mr. McCaskey: Well, if you can recall the conversation, recite it for the Court.

A. Yes, I can. The boy, after I told him who I was and the purpose of my visit, the boy said that no one was to take the truck or touch it and that I couldn't have it; and that was the conversation as I can recall it. [36]

Q. (By Mr. McCaskey): Thank you, Mr. Cook.

Now, Mr. Cook, after you repossessed your truck you took it to California, did you not?

A. I did.

Q. And how long did you keep the truck after you repossessed it?

A. We actually kept the truck in the name of Cook and Sons, Inc., until July, 1957.

Q. Now, Mr. Cook, from September, 1952, when you repossessed your truck until September, 1953, a period of one year approximately, were you contacted by the plaintiff, Mr. Killen?

A. No, sir.

Q. Were you contacted by Mr. Connett?

A. Well, I never—I saw Mr. Connett, but I was never offered anything. He never offered to pay anything.

Q. He never offered to pay you anything?

A. No.

Q. I believe that you testified earlier when you were called as an adverse witness that you came to Alaska in September of 1953? Did you?

A. No, I don't believe I so testified. I was in

(Testimony of Charles E. Cook, Jr.)

Alaska, but I had not come in September; I had come prior to that. [37]

Q. You were in Alaska about one year after re-possession of this particular truck?

A. That is correct.

Q. Did you contact Mr. Killen?

A. I did.

Q. What was the purpose of contacting him?

A. To talk to him about buying Big Timber Lodge; I was interested from an investment standpoint.

Q. I see. Did he indicate to you that he had an interest such as could be conveyed to you?

A. He did.

Q. Did you have more than one conversation with him?

A. As I recall, yes; I can recall that I had two or three; I am sure that I had, at least that I had two.

Q. Were all the conversations relating to Big Timber Lodge? A. They were.

Q. Did Mr. Killen at any time during these two or three conversations charge you with having taken his truck illegally?

A. No, sir, he did not.

Q. I have no further questions at this time, your witness, Mr. Bell.

The Court: We better take the noon recess, also, I have another short matter to take up before recess. [38]

(Testimony of Charles E. Cook, Jr.)

We will suspend then until 2:00 o'clock with this case.

After Noon Recess

The Court: I believe that Mr. Cook was on the stand, you may proceed. He may take the stand and continue with direct examination. If I may be of any assistance with my notes, gentlemen, I will be happy to oblige. I believe you had finished direct examination——

Mr. McCaskey: I would ask that Mr. Cook take the stand and continue with direct examination, your Honor. I have a few more questions to ask.

The Court: Very well.

Mr. Bell: Go right ahead, Mr. McCaskey.

Mr. McCaskey: I would like the assistance of the Court as to the last testimony, if I may.

The Court: The last he testified was about a conversation on direct; it was in connection with a conversation with Mr. Killen concerning the Big Timber Lodge. He said he contemplated investing in it, if there is something else, I have failed to make a note of it.

Mr. McCaskey: Well, if the Court pleases, there has not been covered on direct examination the question of actually picking up the truck. It is my purpose here to inquire into that and so finish direct examination.

The Court: Yes, very well. [39]

Q. (By Mr. McCaskey): Mr. Cook, you did go to the Killen residence, or what was believed by you to be that residence, did you not?

(Testimony of Charles E. Cook, Jr.)

A. I did.

Q. Did you go by yourself?

A. Well, I went twice; the first time that I went to talk; I went to find Mr. Killen and found he wasn't home, then I was there by myself. The second time I had another fellow with me.

Q. Who was the other gentleman?

A. I don't know his name; he was someone here in Anchorage that had a tow truck.

Q. Did you employ him?

A. Yes, to go with me.

Q. On that trip did you see the Killen boy?

A. No, sir, I did not.

Q. Did you or did you not hear the Killen boy say it was someone who represented himself as an officer of the law who was there? A. I did.

Q. Did you so represent yourself?

A. No, sir, I did not.

Q. This gentleman that you took with you later, was he within your hearing at all times?

A. He was. [40]

Q. Do you recall whether he spoke to the Killen boy?

A. Not to my knowledge, he did not speak to the Killen boy.

Q. Did he or did he not represent to the Killen boy that he was an officer? A. He did not.

Q. Did you at any time hear any conversation about a police officer? A. No, sir.

Q. Mr. Cook, are you—how long have you dealt in heavy vehicles?

(Testimony of Charles E. Cook, Jr.)

A. Well, I have—my experience in heavy vehicles covers approximately, up to this time, about approximately fifteen years.

Q. And does that include driving and moving the vehicles as well as selling them?

A. It does for a number of years in my company and under my direction. There was a contract with the police department in Los Angeles in which we impounded and picked up and towed vehicles that were impounded officially by the city; we also had a similar contract with the Los Angeles marshal's office who picked up vehicles in civil actions; in this operation we operated, normally, four heavy-duty tow trucks. We had a great deal of experience picking up vehicles that were hidden away or [41] that the police had in difficult spots to pick up.

Q. This was then not unusual circumstances that you found yourself in? A. It was not.

Q. It was not unusual according to your previous experience? A. That is correct.

Q. You saw Mr. Killen this morning drawing a diagram on the blackboard? A. Yes.

Q. With the Court's permission, I will move it out and ask you to step down, Mr. Cook, and explain to the Court just exactly what you did in order to repossess the truck?

(The witness, Mr. Cook, stepped down to the blackboard.)

A. In the first place I would say that this is a

(Testimony of Charles E. Cook, Jr.)

fair representation of the back yard as I found it. The fence down on both sides, no fence on the alley; there was a fence here of some kind, it was a dog yard. I did find that there. Then this (indicating), I just recall what it was, a good open area there. (Indicating.) I did see the Cat parked there close to the house and the truck was pulled in—nosed in to the Cat here; the pickup, GMC pickup truck was also there; it was pulled head into the house; it was locked; we did not unlock it—we did not unlock the cab or attempt to unlock it. I [42] had the tow truck to back into the pickup; we picked up the rear end by means of jacking on the rear wheels. We moved it in this position in order to get the big truck out. The truck was locked and I had no key; we very easily opened the cab of the big truck, wired it across around the key and we entered the truck and started it up. I kept my foot on the brakes and barely moved it back and forth and started to move it toward the opening on slow speed until I cleared the fence here (indicating), and then backed out and went on.

Q. Now, you may return to the stand, Mr. Cook. And in that maneuver that you just described, did you observe carefully Mr. Killen's property, what you believed to be his property, which included his house and fence? A. I did.

Q. Did you take precautions not to damage anything? A. Yes, sir.

Q. Did you damage the house or fence?

(Testimony of Charles E. Cook, Jr.)

A. No, sir, we did not touch either the house or the fence.

Q. Did you make any inspection after you had completed that maneuver to ascertain whether you had done any damage? A. Yes.

Q. And you were satisfied at that time there was none? [43] A. I was.

Q. At the time you took the vehicle, Mr. Cook, were there any spare parts of any kind in the bed of the truck?

A. No, sir, there was not.

Q. How about the cab of the truck?

A. There was nothing in the cab; no tools of any kind in the cab.

Q. Was there, in fact, as many spare parts, and you may describe the parts if you like, as there had been at the time the truck was sold?

A. No, sir.

Q. Would you tell the Court what the normal accessories were?

A. The normal accessories with that truck were a crude lug wrench and jack. That was the only normal accessories. I don't recall that they were in the truck. Actually this truck was sold and went out with much more than normal accessories. It was going to Alaska; there was, as stated, a considerable list of spare parts; they were not in the truck when I picked it up; I have never seen them.

Q. Those spare parts were not there at the time you got the truck? A. No, sir.

Q. Did it have so much as a spare wheel or

(Testimony of Charles E. Cook, Jr.)

tire? [44] A. It did not.

Q. Do you recall that accessories and spare parts were purchased at the time the truck was bought in California?

A. Well, I couldn't recall exactly, but I can give you a partial list, I think. It would be parts you would normally think that maybe would be necessary to come to Alaska over the Highway. I remember there was at least one axle, there may have been two—there were two, a long and a short. There were two shorter axles; I am reasonably sure there were points and condensers and coils and spark plugs.

Q. Do you recall whether those items were purchased and went with the truck at that time?

A. They were purchased; Mr. Connett arranged for the purchase when I sold him the truck.

Q. From your company?

A. That is correct; I think there was also one or more Universal Joints.

Q. I hand you what purports to be a memorandum, Mr. Cook, can you identify that piece of paper that I am now handing you? A. Yes.

Q. Would you so identify it?

A. These were some notes handed to me by my secretary, whose name was Jo, and these were notes which she had made [45] as a result of conversation she had had with the International truck dealer in Seattle. I had called him, but I was not in the office when the call came through and she talked to him. We wanted information, if we could

(Testimony of Charles E. Cook, Jr.)

get it, as to what requirements would be necessary on a deal going to Alaska; that is what those notes are.

Q. This then is a copy of your office correspondence on this transaction? A. That is.

Q. I would ask that it be introduced. I have already presented to opposing counsel and there are no objections, your Honor.

Mr. Bell: Your Honor, I would appreciate him fixing some date; the little memo has no date; if the date is fixed, we would have no objection to it.

Mr. McCaskey: If it is all right with your Honor, I will ask him to fix a date?

The Court: Yes.

Q. (By Mr. McCaskey): Can you fix an approximate date to this memo?

A. To the best of my recollection this truck transaction with Mr. Connett ran over a period of two or three months, while we were attempting to sell it and get it financed; and it actually consummated on the 7th of [46] May, 1952, so it was sometime within that period of two or three months prior to the consummation of the deal.

Mr. Bell: We have no objection to it, your Honor.

Q. (By Mr. McCaskey): Would you then read from it? Oh, excuse me, I'll introduce it in evidence and have it marked. That would be Exhibit B, I believe.

The Court: Yes.

(Testimony of Charles E. Cook, Jr.)

Q. Would you read from that the last part of the memo, Mr. Cook?

A. Yes. "Driver of truck must have on hand and in the truck spare parts, consisting of spare tires, spark plugs, and axles. It makes considerable difference if the truck is a transport with a load of any kind or empty. Signed Jo."

Q. Do you recall whether or not, Mr. Cook, the purchaser of the truck procured the items in accordance with information received?

A. He did.

Q. Now, did you—did I understand they were not a part of the transaction; the purchaser afterwards procured them? Were they part of the contract price?

A. They were part of the contract price. [47]

Q. Let me ask you, Mr. Cook, were you on hand, did you happen to be on hand when Mr. Connett drove away with the destination of Alaska in mind?

A. I was.

Q. Were these parts that we have just gone over on the truck; did he have them in his possession? A. He did.

Q. Did you furnish the spare parts?

A. I did, yes.

Q. Mr. Cook, there was some testimony by Mr. Killen as to the value of this truck in September, 1952, at the time you repossessed it. Now, I think you have sufficiently qualified as an expert in selling and handling this type of property. What would

(Testimony of Charles E. Cook, Jr.)

you say the value—what is your opinion as to the value of that truck at that time?

A. About \$14,094, and some cents; I would have been happy, most happy to have sold any quantity of those to Mr. Killen.

Mr. Bell: I didn't get that figure, I thought——

A. I think it was \$13,000 and something in the contract.

Q. (By Mr. McCaskey): That is the contract you are referring to, I believe?

A. Yes, that is correct, \$13,496.18 was the contract price.

Q. Do you know whether or not you were happy to sell many [48] of them at that price?

A. Most happy to, yes.

Q. Now, Mr. Cook, turn the contract over. I'll ask you to read at the bottom of the back side of the contract a notation there purported to have been placed there by the Bank of America. What does that notation say?

A. "September 22, 1952. We hereby acknowledge receipt of \$7,737.95 from Cook and Sons, Inc., in full payment of this contract, Bank of America, National Trust Association. Signed by Sally Owen, Assistant Cashier."

Q. Now, reversing the contract, the amounts shown due at the time the contract was executed with Mr. Connett is indicated as being what?

A. Well, on line 8 of the contract, balance, \$9,685.64.

Q. Did you or did you not testify about Mr.

(Testimony of Charles E. Cook, Jr.)

Connet being permitted to take the vehicle out of the State of California, and the bank demanded three payments? A. I did.

Q. There is, I believe on the face of the contract in pencil or perhaps in fine ink writing, below the figure you have just read, \$9,685.64, the figure written in is \$1,206.00. A. That is correct.

Q. Do you have any idea how that figure got, or came to be there? [49]

A. I didn't write it; I presume someone in the bank did; I don't know.

Q. Would that be the amount of three installments?

A. That is approximately the amount, yes.

Q. Would you read for me the amount on line 8, the amount due as to date of execution of the contract? A. "\$9,685.64."

Q. Now, if my arithmetic is correct, I believe it is close, if Mr. Connett did pay \$1,206.00 before leaving California, there was then due and owing on the contract, if I am correct, \$8,470.00?

A. That is correct.

The Court: After deducting the \$1,200.00?

Q. Yes, your Honor.

Now, could you explain if there was \$8,470.00 due on the contract, how you were able to erase your indebtedness to the Bank of America for the figure you related?

A. There was a discount for prepayment of unearned interest; anyone could have done it who

(Testimony of Charles E. Cook, Jr.)

paid it off at that time, so actually with a discount on the contract it was settled for \$7,737.95.

Q. The actual balance was \$8,470?

A. That is correct.

Q. You availed yourself of accelerated payments and received [50] a discount?

A. I did.

Q. Did you have the money, in fact, Mr. Cook, to go to the bank and simply pay off this contract?

Mr. Bell: I object, it is immaterial and irrelevant.

The Court: No doubt, he had difficulty, but I think counsel is right to object, it has no relation to the testimony.

Mr. McCaskey: That is all.

The Court: Very well. You may cross-examine, Mr. Bell.

Mr. Bell: Just a moment, one second, your Honor.

Cross-Examination

By Mr. Bell:

Q. Mr. Cook, when did you get that contract back from the bank?

A. Well, I got it back on approximately the 23rd or 24th of September; it was mailed to me here in Anchorage and I received it general delivery at the Anchorage Post Office.

Q. When was it mailed?

The Court: September 22, apparently.

(Testimony of Charles E. Cook, Jr.)

A. That is when the bank endorsed it down there.

Q. You got it here about the 23rd? Or you got it here [51] the 23rd or 24th, did you not?

A. Something like that, however longer it took to get up here.

Q. Did you show that to anyone here in town after you got it from the bank?

A. Yes, I showed it to someone here in town.

Q. Who did you show it to?

A. I went to the law office; I don't just recall the name of the lawyer, but it was the predecessor of this counsel.

Mr. McCaskey): Moody and Kay, your Honor.

Q. (By Mr. Bell): You showed it to someone there? A. Yes.

Q. Was that after you had taken possession of this truck, or before? A. Before.

Q. How many days had you been in town, in Anchorage, when you took that truck?

A. I had been here long enough to go to Big Timber and see Mr. Connett and he told me he was not going to pay for it, and I came back to Anchorage; I would judge that would take two or three days.

Q. Did Mr. Connett show you a copy of the contract or agreement that he had with Mr. Killen to purchase [52] Big Timber?

A. Yes, he showed it to me.

Q. Did you notice on the second page of that contract—well, did you read the contract?

(Testimony of Charles E. Cook, Jr.)

A. I don't recall that I read it particularly carefully; I did read it, I think.

Q. Now, then, when you—how did you find out where the truck was?

A. Well, Mr. Connett told me where Mr. Killen lived; I also made inquiry in town. He was listed in the telephone book, unless I am mistaken.

Q. Did you know that Mr. Connett had made the deal with a particular Morris Killen before you came to Alaska?

A. No, sir, I didn't learn of the deal until I came to Alaska.

Q. Then you did learn of the deal from Mr. Connett?

A. That is correct.

Q. When did you see Mr. Connett after that time?

A. Well, after that time, I later saw him in California.

Q. About when?

A. I don't recall when.

Q. Was it the same year?

A. Oh, yes, I saw him the same year.

Q. And what was he doing in California?

A. Well, he has always been a dump truck operator; he was [53] and still is, I think.

Q. Was he engaged in a business when you saw him in California after this transaction up here?

A. Yes, sir.

Q. Did he operate the truck at any time?

A. No, sir.

Q. Did anybody drive this truck in any kind of work after you took it away from up here until

(Testimony of Charles E. Cook, Jr.)

1947? A. Do you mean 1947?

Q. 1957. A. Yes, the truck was operated.

Q. Who operated it?

A. Cook and Sons, Inc.

Q. For what purpose?

A. Dump truck operation. We were licensed by the City and California Dump Truck Operators; we operated this truck as well as others.

Q. Just this one?

A. We operated this one as well as others.

Q. From the time you got home with the truck up to 1957, then, it was operated by Cook and Sons, Inc.?

A. That is correct.

Q. Then did you sell it in 1957?

A. I sold it in July, 1957.

Q. Who did you sell it to? [54]

A. Mr. Leroy Chriseana; I sold it with a job consulting works in Orange, California.

Q. What time was it that you next came to Alaska after you had picked up this truck?

A. I was in Alaska in 1953.

Q. Do you remember talking to anyone in Anchorage in 1953 about this truck?

A. Well, I talked to Mr. Killen in 1953, if that's what you mean.

Q. Well, did you first talk to me to know where Mr. Killen was?

A. Yes, I think that I called you; I don't recall exactly.

Q. Did I tell you that he lived at Homer?

A. That is correct.

(Testimony of Charles E. Cook, Jr.)

Q. Then did you drive to Homer?

A. I did.

Q. Was your son with you? A. He was.

Q. When you got down there Mr. Killen was not there, is that right?

A. That is correct.

Q. Did you call from down there to Anchorage to get in touch with Mr. Killen?

A. Honestly, I don't recall; I came back, but whether I called from there, I don't [55] remember.

Q. Just to refresh your memory, did you call me and ask me if I knew where Mr. Killen was and were you not informed that he had just come into my office? Isn't that right?

A. Now, that you mention it, that is right, I guess.

Q. Did you come on up and have a talk with Mr. Killen? A. I did.

Q. And did you ask him to give you a release as against Mr. Connett? A. No, sir.

Q. Did you talk to him about anything, any kind of—

A. I talked to him about purchasing the Big Timber Lodge; I told him I was interested; that's what I talked to him about.

Q. Well, how did you come up here in 1953?

A. We drove.

Q. Now, did you talk to him about signing a release as to Mr. Connett in any way?

A. No.

(Testimony of Charles E. Cook, Jr.)

Q. Now, if you were interested in Big Timber in any way, you knew Mr. Connett had a contract?

A. Yes, I knew he had a contract; he told me and he showed it to me.

Q. Well, did you ask Mr. Killen to give you a release as to Mr. Connett or ask him if he would do it? [56]

A. Well, I discussed with him about——

Mr. McCaskey: I would ask counsel to state what kind of release that he is talking about, your Honor.

The Court: Objection overruled, the witness may finish his answer.

A. I have stated the conversation to the best of my ability. I talked to Mr. Killen about the purchase of Big Timber Lodge.

Q. (By Mr. Bell): Where were you when you talked to him?

A. In the Parsons Hotel; I am not just sure.

Q. For purposes of refreshing your memory, you did ask him about giving you a release as to Mr. Connett, did you not?

A. I knew Connett had a contract on Big Timber and we no doubt discussed the situation, but it was not my purpose to get a release from Connett; it was——

Q. Did you in that conversation ask Mr. Killen to do anything; did you make him an offer of money if he would do anything?

A. I was prepared to make an offer of a down payment on the property binding the bargain.

(Testimony of Charles E. Cook, Jr.)

Q. How much was the offer that you made?

A. I think it was \$1,500.00. [57]

Q. Wasn't it just five hundred dollars to make it, to refresh your memory?

A. No, I don't so recall.

The Court: That was on the deal for Big Timber Lodge? A. That is correct.

Q. We think that will clear itself up in just a moment. Was there anything said to Mr. Killen about attorney's fees in California and attorney's fees here in that deal? A. What deal?

Q. The one when you talked to Mr. Killen; was there anything said that you would give him so much money and would pay the attorney's fees in California and here?

A. Attorney's fees for what, may I ask?

Q. Was there any attorney's fees mentioned?

A. Not to my knowledge.

Q. Do you remember Mr. Killen telling you that he had some attorneys in California trying to find Connett and also hunting you down there? Do you remember Mr. Killen telling you that?

A. I remember him telling me of attorneys trying to find Mr. Connett, but I wasn't hard to find, I was on 14000 Oxford Street and had been right along for years. [58]

Q. There was some talk about it?

A. Not about finding me.

Q. About him, about the California attorneys?

A. That I do not know.

Q. Do you remember anything about the at-

(Testimony of Charles E. Cook, Jr.)

torney's fees that he said he would have to pay here if he made a deal with you of any kind?

A. No, I don't remember that.

Q. Did you offer to give him a sum of money and some attorney's fees somewhere?

A. Well, we were discussing a deal on Big Timber; we might have discussed what the consideration would be; I just don't recall.

Q. Now, when you talked to the young boy, the Killen boy, he told you not to take the truck, not to touch it, that his father was out of town?

A. He did.

Q. I believe that you said he told you his father had gone to Texas?

A. I don't just remember just exactly; he said he was out of town out in the States; I don't remember whether he told me where.

Q. When you went away you went and got someone with a tow truck to help you, did you not?

A. I did. [59]

Q. What time did you return to the Killen home that day?

A. I don't remember; it was daylight.

Q. Something after 1:00 o'clock?

A. Yes.

Q. You knew the boy was going to work on time at 1:00 o'clock? A. I did.

Q. Now, did you know that there would be no one home at the Killen place then?

A. No, I didn't know that?

Q. You knew of no one who would be there, the

(Testimony of Charles E. Cook, Jr.)

father and mother were in Texas and the sisters at work, isn't that right?

Mr. McCaskey: I object, your Honor, he is arguing with the witness.

The Court: Of course, he can ask him whether he did or did not know.

Q. (By Mr. Bell): You knew the mother and father were in the States in Texas?

A. No, I knew they were not there; I don't recall that they were in Texas.

Q. Do you remember the boy telling you that he had to be at work at that time? He had to be to work at 1:00?

A. Yes, that is correct. [60]

Q. Did he tell you what time his sisters would be at work? A. I don't recall.

Q. You didn't see anything of the Killen family when you were there?

A. Which time do you refer to?

Q. The second time when you took the truck away.

A. No, I didn't see anything of the Killen family there.

Q. You spoke about it being locked up and you wired across. In other words, you put a wire across over the ignition and got the motor started that way, did you not? A. That is correct.

Q. How did you stop that motor when you got ready to stop it? A. Remove the wire.

Q. That is what you did in operating it that day? A. That is correct.

(Testimony of Charles E. Cook, Jr.)

Q. How did you get Mr. Killen's truck, pickup truck out of the way; it was blocking the equipment, was it not? A. Yes.

Q. Well, how did you get away from there?

A. I picked up the rear-end and by means of maneuvering moved it over to the spot, open spot in the yard.

Q. Now, when you did that the big truck was between the doghouse or dog pen and the big Caterpillar, was it not? [61] A. It was.

Q. How did you get the truck out from those two things?

A. I had it started and running and I backed it back and forth very slowly and carefully and at the same time I had the winch from the tow truck sliding over the rear end.

Q. So you moved the rear end of the big truck sideways? A. That is correct.

Q. When you got it around sideways, how did you get it around the corner of the house?

A. The corner of the house was not involved, it was in the back yard.

Q. The front end of it was clear up against the cat touching it, was it not?

A. The cat protected the house and the house was not involved in getting the truck; there was room to maneuver the truck between the dog house and the cat or whatever it was.

Q. When you pulled the back end sideways, you raked the corner of the house, did you not?

A. I did not, no, sir.

(Testimony of Charles E. Cook, Jr.)

Q. Now, after you got that truck out of there, did you talk to anybody here in town before you left? A. No, sir.

Q. Never talked to your attorney or [62] anyone? A. No, sir.

Q. What time did you leave Anchorage then going back with the truck?

A. I don't remember, sir.

Q. Well, was it 2:00 or 3:00 o'clock, or 4:00 o'clock?

A. It was sometime—it was still daylight in the afternoon.

Q. And it was in September around the 22nd or 23rd or the 24th? A. The 24th or 25th.

Q. What time did you—did you see Connett when you went by the Big Timber Lodge?

A. I did not.

Q. You didn't tell him that you had the truck?

A. He was not there; I didn't stop, at least.

Q. You did see him the day before there, did you not?

A. No, it wasn't the day before that I saw him, it was two or three days before; I don't know how many.

Q. He was living in Big Timber Lodge?

A. Oh, yes, he was, as far as I know.

Q. When you went by Big Timber Lodge was it daylight?

A. I don't believe it was; I don't just remember.

(Testimony of Charles E. Cook, Jr.)

Q. What time—about what time did you pass there? A. I don't recall.

Q. You went through there to Tok, did you not?

A. Yes. [63]

Q. From Tok over to the Border you had to wait for them to open up in the morning?

A. That is correct.

Q. Then after they did open up you went right on through? A. That's correct also.

Q. Where did you go out of Canada, then?

A. Well, I went down there to Seattle; I don't recall the name of the port of entry. I did not go to Vancouver; I went down the Hart Highway.

Q. You were a couple of days, three days getting through Canada, were you not?

A. I presume so; I drove home in six days.

Q. Were you all alone on that trip?

A. I was all alone, yes.

Q. Then when you went out to Killen's place that afternoon you took the tow truck operator along with you at the time you went out?

A. Which time, the first or second time?

Q. The second time when you took the truck away.

A. Second trip, I did.

Q. Did you intend—you went there with the intention of taking the truck? A. I did.

Q. Now, I believe that you stated that in your opinion the value of the truck was \$13,496.18; is that the [64] condition it was in at the time you sold it?

(Testimony of Charles E. Cook, Jr.)

A. That was the condition it was at the time that I sold it. That is what I sold it for.

Q. Was there a double hoist bed on it?

A. Yes, two-cylinder, three-stage.

Q. Now, you paid the bank \$7,737.00 in order to get that paper back, did you not?

A. Yes, sir.

Q. That made a difference then in what you said the value was and the amount you had to pay to get it of five thousand, seven hundred fifty-nine dollars and eighteen cents. Is that about the way you figured it?

A. I didn't figure it, sir.

Q. I see. Now, you say that anyone could have paid that truck off with an interest discount just like you did for \$7,737?

A. Anyone, either Connett or Mr. Killen could have, a stranger to the deal could not have.

Q. But you could?

A. I got no special arrangements; I just had to pay them off.

Q. Either of them could have paid it off for that amount?

A. That is correct, at that time, yes.

Q. Now, did you drive that truck all the way down there without any spare tires? [65]

A. I drove it all the way without a spare wheel or tire, or a pair of pliers or screwdriver or anything, any other tool.

Q. Excellent truck, wasn't it?

A. It was.

(Testimony of Charles E. Cook, Jr.)

Q. You are experienced in handling automobiles, aren't you?

A. Well, I have had considerable experience, yes.

Q. You know that such things would be utterly foolish, driving without those?

A. I also know it is very easy to stop another truck on the road and get such help as may be needed. I have driven trucks in North Africa, Sahara Desert, and all over the United States.

Q. But you also took spare tires?

A. I try to take them if possible.

Q. Is this the only one you made a long trip with without taking a spare tire, or spare tires?

A. No, I have made others.

Q. This is over five thousand miles, isn't it?

A. It wasn't when I drove it; it was about four thousand, I believe, to Los Angeles.

Q. It is?

A. So far as spare tires are concerned when you drive that kind of a truck you have four spare tires mounted [66] on the rear axles, as you well know.

Q. But you didn't have spare tires; none of those have spare tires?

A. I had no spare tires. What I am trying to say is that it is a three-axle truck with ten wheels on it. The only flat that can hurt you is on the front, because you have four tires on the rear and it is a simple matter to take one off and put it on the front should you have a flat tire.

(Testimony of Charles E. Cook, Jr.)

Q. Do you know what the value of this car was in California, in Los Angeles? Do you know how much the freight on a truck of this kind into Anchorage is? A. Well, I don't exactly.

Q. It is about eight hundred dollars.

A. I really don't know, you are perhaps correct on that.

Q. Did you talk to the dealers of these cars here, the same car here in Anchorage?

A. No, I did not.

Q. Eight hundred dollars would be approximately the right amount of freight, would it not?

A. I imagine it would be, yes.

Q. I think that is all.

Mr. McCaskey: That is all of this witness—oh, I have a few on redirect examination, your [67] Honor.

Redirect Examination

By Mr. McCaskey:

Q. Mr. Cook, I will ask you point blank, you stated, I believe, did you not, that you left town the same day that you repossessed the truck?

A. I did so state.

Q. Was that because you were afraid someone would grab you?

Mr. Bell: I object to self-serving alibis, for one thing it would not be admissible.

The Court: Sustained.

Q. (By Mr. McCaskey): Mr. Bell has brought out, Mr. Cook, the fact that you talked to Mr. Kil-

(Testimony of Charles E. Cook, Jr.)

len and you admitted in direct examination and also in Mr. Bell's cross-examination you had talked to Mr. Killen. This question has been covered before perhaps. I'll ask you if at any time did Mr. Killen offer to pay you the balance due on the truck?

A. No, sir, he did not.

Q. I believe you stated, did you not, that in your conversation with Mr. Killen in 1953, the truck was not discussed?

A. That is correct.

Mr. McCaskey: I have no further questions, your Honor. [68]

Mr. Bell: I have nothing further.

The Court: The witness may be excused.

(Whereupon the Witness Was Excused.)

Mr. McCaskey: The defendant rests, your Honor.

The Court: Very well. Is there any rebuttal?

Mr. Bell: I would like to call, in rebuttal, Mr. Morris Killen for a few questions

MORRIS KILLEN

resumed the stand in rebuttal and testified as follows:

Direct Examination

By Mr. Bell:

Q. You are the same Morris Killen who testified in this case? A. I am.

Q. Mr. Killen, I believe you testified on direct examination concerning two spare wheels, tires,

(Testimony of Morris Killen.)

and tubes; is that correct?

A. That is correct.

Q. When did you last see those spare tires and tubes and wheels?

A. When I went Outside; when I stacked the equipment the tires, tubes, and wheels were in the back of the truck, and some of the parts referred to were in the cab of the truck. The axles were in the back of the truck, [69] and this truck was never used one hour, just driven down, and there was some grease that came with the truck that I never used, and other things from Big Timber that was brought to my yard and stacked.

Q. Now, when you last saw it before you left were these tires and tubes and wheels in it there?

A. They were.

Q. Were the axles that you referred to there?

A. They were.

Q. Were your tools there?

A. Miscellaneous tools and oil filters and points were in the cab of that truck locked up.

Q. Now, you heard some of the defendant's testimony that he met you and about having a conversation with you. Was there every anything said about him buying the Big Timber Lodge from you?

A. I would like to tell the Court—

Q. Just tell what was actually said.

A. Actual words as said when I came to Anchorage in 1953?

Q. Yes.

A. I was on my way outside in my plane; I

(Testimony of Morris Killen.)

always come into your office and turn my business over to you when I leave. You told me that you thought Mr. Cook, the man that came up and got my truck, was trying to locate me. While we were sitting there talking Mr. Cook called from Homer and asked would I meet him. I [70] told him that I was on my way outside; he asked me to wait and meet him and talk with him and I told him that I would. At 7:00 o'clock that night I met him at the Parsons Hotel and with him was a man he said was his son. I can't remember at any time Mr. Cook ever trying to buy Big Timber Lodge. Mr. Cook's conversation with me was to release anything or any hold that I might have against Mr. Connett and in return Mr. Cook offered me five hundred and I told him that was a very small amount that I had two attorneys working in California and that I had one here. He said that that would be bound to be a minor charge and that he would pay that and still give me the five hundred dollars. Then he said, "I'll have to find out."

Q. Now, did he ever mention, that you can remember, any financial transactions or effort to buy Big Timber Lodge from you?

A. He did not to me, no.

Mr. Bell: You may take the witness.

(Testimony of Morris Killen.)

Cross-Examination

By Mr. McCaskey:

Q. Did you or did you not testify that this truck was driven only by you from Big Timber and that was only a few days before your departure to Texas?

A. I didn't say it was driven by me; it was driven from [71] Big Timber and placed in my yard.

Q. How long have you had the truck—how long had you had that truck in your possession?

A. From the day the contract was signed until I went Outside; I can't give you an exact date, definite date when I went Outside.

Q. What month did you go Outside?

A. I am quite sure it was sometime in the latter part of August, sometime in the latter part of August.

Q. You testified then that you had the truck as of the day this contract was signed with Mr. Connett?

A. No, I received the truck when I went back to Big Timber.

Q. Did I not understand you to say a moment ago that you had this truck when the contract was executed?

A. I would say that I did not; he transferred it over, only it was at Big Timber.

Q. The contract was dated the 25th of June,

(Testimony of Morris Killen.)

1952, would you say you had the truck at that time?

A. I testified to the contract already.

Q. Yes, and according to your testimony, if I am correct, you just testified that you had the truck from the date of this contract?

Mr. Bell: Your Honor, I object, that is the third time he has asked that question. [72]

The Court: Well, counsel's question was how long he had it from the 25th of June; he got it on that date and he had it ever since.

Mr. McCaskey: Thank you, your Honor.

The Court: Those are the facts.

A. I had it until they took it.

The Court: From the 25th of June?

A. Your Honor, Mr. Connett and I drove from Big Timber and we signed the papers and transferred it and signed the papers for the lodge. After the transfer it was a deal and I felt I had come into the possession of it and that he had come into possession of Big Timber, so I would be in possession of the truck at that time, the time the contract was signed.

Q. Where was the truck at that time?

A. It was signed in here.

Q. No, I said, where was the truck at that time?

A. Oh, Big Timber.

Q. Was it moved from Big Timber between that time and the time you brought it down to Anchorage?

A. I was breaking Mr. Connett in on how to

(Testimony of Morris Killen.)

run the place for approximately a week before I walked off and left him; I showed him the ropes for approximately a week and after that I locked my personal belongings in the truck and brought a trailer and pickup; my son-in-law drove the [73] truck down here. I had my airplane and I had flew it up there.

Q. Now, you know, do you not, it is necessary to have a certificate of title to move such a truck?

The Court: What?

Q. A certificate of title to move the truck?

A. How?

Q. You knew it was necessary to have a certificate of title with the car?

A. Yes. I say so this way, let me explain myself, will you? I say it is necessary when the truck is to be paid off that I was to have the certificate of title, but as long as I had a contract on the truck—I wasn't entitled to it until the truck was paid off.

Q. You knew full well that it wasn't your truck after it wasn't Connett's?

A. I knew full well I had an equity in the truck; I knew full well that Mr. Connett had an equity in it.

Q. What sort of a title did Mr. Connett give you? A. Sir?

Q. What sort of title did Mr. Connett give you? He must have given you some evidence of title?

A. Yes, he gave me a registration of it or something; I think it is there in the file, and also a key.

(Testimony of Morris Killen.)

Q. Did he tell you how much he owed on it yet? [74] A. Sir?

Q. Did he tell you how much he owed on the truck? A. Yes, the papers showed that.

Q. What papers?

A. That he turned over to me.

Q. Was that the conditional sales contract?

A. As I spoke of it, the registration of it, I believe.

Q. In other words, the registration and title, which he turned over to you, which allowed you to operate the vehicle on the highway indicated that the vendor had a lien against the truck?

A. The Bank of America, yes.

Mr. Bell: You may use this if you like; it will clarify it for you.

Mr. McCaskey: Thank you. Do you object to my introducing it, Mr. Bell?

Mr. Bell: Not a bit.

Mr. McCaskey: I will introduce it as Defendant's Exhibit C, however it came from the plaintiff and the plaintiff has no objection to introducing it; it doesn't make any difference how it is identified.

Mr. Bell: It is your exhibit if I can help to make it clear.

Mr. McCaskey: Very well. [75]

Q. (By Mr. McCaskey): Now, you testified, Mr. Killen, that Mr. Cook asked you to release what you had against Mr. Connett, did you not?

A. Mr. Cook asked me to release anything,

(Testimony of Morris Killen.)

things that I might have; I don't know how he would explain it, any holdings that I had against Connett.

Q. What did you have against Mr. Cook?

A. What do you mean?

Q. What did you have against Mr. Cook if you had not paid?

A. I found out one year later that the truck was not paid off as to the contract, my recourse, all I could say is I didn't even know Mr. Cook existed in the picture until he came up. I didn't even know he existed until that time. I was trying to get my money through Mr. Connett in California and it seemed to me Mr. Cook wanted me to release any holding that I might have against Mr. Connett to where he could come back at him, back at Mr. Connett.

Q. I don't quite follow you, but never mind. Did you, do you at the present time have an action pending against Mr. Connett anyplace?

A. No, I don't have.

Q. Did you endeavor to file an action?

A. We started our action in Los Angeles, yes. We tried [76] and we had the law down there working on it.

Q. As to your knowledge, is that suit still pending?

A. I don't know, I couldn't say.

Q. Mr. Killen, have you ever seen Mr. Connett since September, 1952, September 27, 1952?

A. Yes, I have seen him before September, 1952; I seen him in June.

(Testimony of Morris Killen.)

Q. No, after September?

A. Oh, after, no, sir, I did not.

Q. You have never seen him since that time?

A. No, sir, I did not.

Q. Now, Mr. Killen, as to your departure for Texas, it has been testified, I believe, that you left before September 27 and that you parked the truck in this position on your premises? (Indicating.)

A. That is correct.

Q. How long had the truck been there, say, since September 27, 1952, during approximately when you went out the first or 15th of September?

A. No, I went out before September—no sometime in October.

Q. Sometime in October? Then the truck had been there at least one month at that time?

A. Oh, wait a minute, June, July, August—I went out before September, it was sometime in [77] August.

Q. Well, would it be a fair statement to say that the truck had been on the premises for about one month before Mr. Cook picked it up?

A. Yes, I would say that it was there a good month.

Q. Is it a fair statement to say that inasmuch as Mr. Cook had ready access to the yard that anyone else could have access to your premises?

A. How's that?

Q. Is it a fair statement to say that most anyone could have walked on to the premises during the month's absence?

(Testimony of Morris Killen.)

A. I doubt it. I have lived there since 1948 and up till that time I never had anything taken out of my yard.

Q. Well, Mr. Cook had no trouble walking into your yard?

A. No, I wouldn't either if I found Mr. Cook was somewhere.

Q. The truck was unattended for a month during your absence?

A. My son was there.

Mr. McCaskey: I have nothing further, your Honor.

Mr. Bell: That is all I have.

(Whereupon the Witness Was Excused.) [78]

This will certify that I, Dolores D. Runner, Court Reporter for the Third Judicial Division, District of Alaska, transcribed the foregoing pages, Nos. 1 to 78, inclusive, and that such pages were transcribed from my official notes and represent a full, true and accurate transcript of testimony of witnesses for the plaintiff and defendant as follows: For plaintiff, Morris Killen; for defendant, Charles E. Cook, Jr.

Dated at Anchorage, Alaska, this 17th day of March, 1959.

/s/ DOLORES D. RUNNER.

[Endorsed]: Filed March 20, 1959. [79]

PLAINTIFF'S EXHIBIT No. 1

Assignment of Conditional Sales Contract

Know All Men by These Presents:

That on the 13th day of October, 1951, Ray Kyes entered into a Conditional Sale Contract with Morris Killen for the sale of the store, bar, roadhouse and restaurant generally known as Big Timber which is located at or near the junction of the Richardson Highway with the Tok cut-off at or near Mile 130.2 on the west side of the Richardson Highway;

Now Therefore, for and in consideration of certain chattel properties being sold, assigned, conveyed, and delivered to Morris Killen as the down payment for the assignment of said Conditional Sale Contract, the said Morris Killen hereby assigns, sets over, conveys and grants all of his right under the said contract to Mahlon J. Connett, with all rights to do any act or thing that he, the said Morris Killen, could do or perform under the terms of said Conditional Sale Contract, with full power to sue and the right to defend in case suit should be filed against him, as fully as he, the said Morris Killen, could do.

I.

It Is Agreed that as a part of the purchase price of this Assignment, the buyer, Mahlon J. Connett, assumes all of the liability under the terms of said

Conditional Sale Contract, and agrees to hold Morris Killen free from any liability created by said contract, and agrees to pay the balance due on a contract entered into November 17, 1951, by and between J. C. Merrington as the conditional seller and Morris Killen as the conditional purchaser of one R. H. Shepherd Generating Plant, on which there is a balance due of approximately Twelve Hundred Dollars (\$1,200.00).

II.

Purchaser assumes the contract with the Northern Commercial Company, and agrees to pay the same, wherein and whereby Morris Killen purchased a Wittie Light Plant on payments, which light plant has been installed in and on the property above described.

III.

Purchaser agrees to take over the contract with Chuck Johnson for the purchase of one 5-ball machine, one (1) bowling alley, one (1) Seeburg nickle juke box, on which there is a balance due the said Chuck Johnson in the sum of approximately Eight Hundred Dollars (\$800.00) payable on September 1, 1952.

IV.

Purchaser assumes and agrees to comply with the contract with the Standard Oil Company for two (2) 2,500 gallon gas tanks and pumps and one (1) air compressor, and to take all rights that the

said Morris Killen has under the terms of any and all of the above-named contracts, and to assume the same liability that the said Morris Killen is obligated to by reason of said contracts.

V.

It Is Understood and Agreed that the down payment of chattel property of the value of Fifteen Thousand Dollars (\$15,000.00) consists of the following:

One (1) International Dump Truck, Model 1952, Motor No. RD 450-18333, Serial No. 1252, title of said truck to be delivered to Morris Killen, and the said Mahlon J. Connett agrees to pay all indebtedness against the truck and clear the same completely within ninety (90) days from this date, and informs the said Morris Killen that there is a Conditional Sale Contract against this truck whereby Mahlon J. Connett is obligated to pay to the Bank of America an indebtedness of approximately Seven Thousand Five Hundred Dollars (\$7,500.00) balance, which the said Mahlon J. Connett will pay direct to the Bank of America within the agreed ninety (90) days from this date, and has, at the signing of this contract, delivered the truck to the said Morris Killen and hereby sells, assigns, and sets over to the said Morris Killen said truck.

One (1) 1950 G.M.C. pick-up truck, Motor No. A228-325-697, which at the signing of this contract

the said Mahlon J. Connett agrees to convey and deliver the absolute possession of to the said Morris Killen, and

One (1) 1947 Palace House Trailer, No. W-1127,

All to be clear and free from any encumbrance and to be conveyed by good and sufficient conveyance at the signing of this contract.

VI.

It Is Further Agreed that the balance of Fifteen Thousand Dollars (\$15,000.00), representing a purchase price of Thirty Thousand Dollars (\$30,000.00), of all right, title and interest of the said Morris Killen in and to the said property will be paid as follows:

The said Fifteen Thousand Dollars (\$15,000.00) to be paid in payments as follows:

Two Hundred Dollars (\$200.00) per month during the six (6) summer months, which are April, May, June, July, August, and September; and

One Hundred Dollars (\$100.00) per month during the six (6) winter months, which are October, November, December, January, February, and March.

It is further agreed that the unpaid balance of the purchase price shall bear interest at the rate of five per cent (5%) per annum, which interest

shall be payable monthly on the balance due at all times, and be paid at the same time any payments herein provided for shall become due and payable.

However, if the said Ray Kyes, mentioned in the Conditional Sale Contract, is unable to deliver a good and sufficient title to the real estate mentioned in the conditional sale contract on or before the 13th day of October, 1952, then the contract purchaser, to wit, Mahlon J. Connett, will increase the payments to Four Hundred Dollars (\$400.00) per month each and every month of the year, from the time of the signing of this contract until the balance is fully paid or the said Ray Kyes shall deliver good and sufficient title as provided in the contract, at which time and event the payments shall drop back to the sum of Two Hundred Dollars (\$200.00) per month for summer months and One Hundred Dollars (\$100.00) per month for winter months as above provided.

Dated at Anchorage, Alaska, this 25th day of June, 1952.

/s/ MORRIS KILLEN,

/s/ MAHLON J. CONNETT.

Witnesses:

/s/ BAILEY E. BELL,

/s/ LAILA PETERSON.

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 25th day of June, 1952, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and Sworn, personally appeared Morris Killen and Mahlon J. Connett, to me personally known and to me known to be the individuals described in and who executed the foregoing instrument of writing and each acknowledged to me that he signed and sealed the same freely and voluntarily for the uses and purposes therein mentioned.

In Witness Whereof I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.

[Seal] /s/ BAILEY E. BELL,
Notary Public, Territory of
Alaska.

My Commission expires: 1-28-53.

Received in evidence August 4, 1958.



Mahlon J. Connett 76 AT 20-14900

CONTRACT NUMBER

PURCHASER'S NAME

AUTOMOBILE CONDITIONAL SALE CONTRACT

The undersigned Seller hereby sells and the undersigned Purchaser hereby purchases subject to the terms and conditions set forth hereunder and on the reverse side hereof the following described property to-wit:

YEAR MODEL	NEW OR USED	MAKE TRADE NAME	NO. OF CYL.	EQUIPMENT, STANDARD, SPORT, DE LUXE, ETC.	TYPE OF BODY AND TONNAGE IF TRUCK	MODEL LETTER OR ID.	MANUFACTURER'S SERIAL NO.	ENGINE NO.
52	N	International	6		Dump 3-Axle	LP211	1252	RD 450- 18333

1. Cash Selling Price Including Accessories \$ 13,496.18 State Sales Tax \$ _____ Total \$ 13,496.18

Radio ☐ Master ☐ If new Truck, \$ _____ license fee is included in above price.

2. Down Payment, Cash to Seller. \$ 5000 00

Trade-in None \$ _____ Less Owing \$ _____ Total Down Payment \$ 5000 00

3. Amount unpaid on Cash Selling Price (Item 1 less Item 2) \$ 8,496.18

The undersigned make joint application for the following insurance starting _____, 19____, and Purchaser authorizes the Seller to include the premium in the obligation and to pay for the insurance.

	PREMIUM	TERM (MONTHS)	IF INSURANCE EXPIRES BEFORE OR AFTER CONTRACT EXPIRES, MARK WHICH
FIRE AND THEFT	\$ _____	BEFORE	<input type="checkbox"/>
COMPREHENSIVE	\$ _____	BEFORE	<input type="checkbox"/>
COLLISION	\$ _____	BEFORE	<input type="checkbox"/>
OTHER INSURANCE	\$ _____	BEFORE	<input type="checkbox"/>
OTHER INSURANCE	\$ _____	BEFORE	<input type="checkbox"/>
Insurance not covering interest of Purchaser \$ _____ Kind _____		BEFORE	<input type="checkbox"/>

**DEFENDANT'S
EXHIBIT**
a
9214

Insurance furnished by purchaser thru Thurber, Moody & Cox, Agts.
4. TOTAL PREMIUM included in contract balance Van Nuys \$ _____

5. Fees paid: Notary Public \$ _____; Registration and Transfer \$ _____; Other \$ _____

6. Amount of unpaid balance to be financed, including insurance (Sum of Items 3, 4 and 5) \$ 8,496 18

7. Amount of Time Price differential (financing charge) \$ 1,189 46

8. AMOUNT OF CONTRACT BALANCE (Sum of Items 6 and 7) \$ 9,685 64

9. Said Contract Balance is payable as follows:

403.76 June 20, 1952, and 23 equal successive monthly installments

of \$ 403.56 beginning July 20, 1952, and continuing till paid

which Purchaser promises to pay to Seller together with all such other sums as are hereinafter provided for, payable at office of the Seller, or if this contract is assigned, then payable at office of assignee of Seller, with interest thereon after maturity at the highest rate for which parties may lawfully contract in the State in which this contract is executed, payable monthly, and if the services of an attorney be employed for the enforcement of any of the obligations of Purchaser, or the rights of Seller, either by suit or otherwise, Purchaser agrees to pay reasonable attorney's fees.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 7th day of May, 1952.

at Van Nuys Calif.
City State
Cook & Sons, Incorporated
Selling Agent
Charles J. Cook Pres.
Title
14900 Oxnard St., Van Nuys, Calif.
Address

Mahlon J. Connett
Purchaser Sign Here
Gen. Del., Fairbanks, Alaska
14322 Gilmore, Van Nuys, Calif.
Address

TERMS AND CONDITIONS

Purchaser and Seller agree as follows:

1. Title to said property shall not pass to Purchaser until said contract balance and other sums due hereunder are fully paid in cash. No loss, injury or destruction of said property shall release Purchaser from his obligations hereunder; Seller may assign this contract and any assignee of Seller shall be entitled to all the rights of Seller. Purchaser shall keep said property free of all taxes, liens and encumbrances; shall not use same illegally, improperly or for hire; shall not remove same from the state without permission of the holder of this contract (shall not transfer any interest in this contract or said property) Any sum of money paid by Seller in payment or discharge of taxes, liens and encumbrances on said property shall be secured by and under this contract.
2. In the event that the total price payable hereunder does not include a charge for insurance to be procured by Seller, or if insurance so procured or insurance provided by the purchaser expires before the contract shall have been paid in full, Purchaser shall furnish to Seller upon request satisfactory evidence of such insurance as Seller may request. Upon failure of Purchaser to do so, Seller may procure such insurance, and in that event Purchaser agrees to pay the premium therefor upon demand, as an additional part of the obligation hereunder. Proceeds of any insurance, whether paid by reason of loss, injury, return premium or otherwise, are hereby assigned to Seller and shall be applied toward the replacement of the property or payment of this obligation, at the option of Seller.
3. Time is of the essence of this contract and in the event Purchaser defaults on any payment due under this contract or fails to comply with any condition or provision of this contract or a proceeding in bankruptcy, receivership or insolvency be instituted by or against Purchaser or his property, all sums payable hereunder, at option of Seller, shall be immediately due and payable and Seller may thereupon sue Purchaser for the same and Purchaser will also pay a reasonable attorney's fee. Further, upon such default, Seller or any officer of the law may take immediate possession of said property without demand or possession after default being unlawful), including any equipment or accessories thereto; and for this purpose Seller may enter upon the premises where said property may be and remove same. Such repossession shall terminate Purchaser's rights hereunder and Seller may retain said property and all payments made prior thereto by Purchaser hereunder as rent and compensation for the use of said property by Purchaser. Seller may, but shall not be required so to do, resell said property, so retaken, at public or private sale, without demand for performance, with or without notice to Purchaser (if given, notice by mail to address below being sufficient), with or without having such property at place of sale, and upon such terms and in such manner as Seller may determine; Seller may bid at any such sale. From proceeds of any such sale, Seller shall deduct all expenses for retaking, repairing and selling such property including a reasonable attorney's fee. The balance thereof shall be applied to amount due; any surplus shall be paid over to Purchaser; in case of deficiency Purchaser shall pay the same with interest at 7% per annum.
4. Seller's acceptance of any installment or payment after it or the full amount may have become due and payable hereunder shall not be deemed to affect or affect Purchaser's obligation and/or Seller's rights hereunder with respect to any subsequent payments or default therein.
5. No warranties, expressed or implied, representations, promises or statements have been made by Seller unless endorsed hereon in writing. Any statement as to year model is for identification only and is not a warranty or representation. No modification of any of the terms or conditions hereof shall be valid in any event unless made in writing duly executed by Purchaser and Seller. Purchaser warrants that no other extension of credit exists or is to be made in connection with this transaction. Any provision of this contract which may be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the remaining provisions of the contract. This contract has been executed in duplicate and Purchaser acknowledges receipt of a copy.
6. Should Purchaser fail to make any payment herein required when due, Seller may refer the matter of the collection of such delinquent instalment to any person or collection agency or to the Collection Department of the Seller for collection, and if the same be so referred, Purchaser agrees to pay to Seller a reasonable charge.

ASSIGNMENT AND GUARANTY

FOR VALUE RECEIVED, the undersigned does hereby sell, assign, and transfer to the Bank of America

his, its or their right, title and interest in and to the within contract, the property therein described and all moneys to become due thereunder. In consideration of the purchase of the within contract, the undersigned guarantees payment of the unpaid balance and agrees to pay upon demand, the unpaid balance, if the purchaser defaults in the performance of the contract or any of the warranties are found untrue. The undersigned warrants that the title of the aforesaid property rests in the undersigned, that the undersigned has the right to make this assignment and that the aforesaid property is free from any liens or encumbrances. The undersigned hereby consents that the assignee above named, or its successors or assigns, may without notice extend the time for payments under said contract, waive the performance of such terms and conditions as it, or they, may determine, and make any reasonable settlement thereunder, without affecting or limiting the undersigned's liability as guarantor.

For the purpose of inducing the above named assignee to purchase said contract, the undersigned submits the accompanying purchaser's statement, which the undersigned believes to be substantially true, and states that the said contract arose from the bona fide sale of the property described in said contract, and that said property has been delivered into the possession of the purchaser therein named. In further consideration of the purchase of this contract the undersigned agrees that if the property therein described is returned by or repossessed from the purchaser, the assignee, its successors or assigns, may recover from the undersigned the balance due on said contract, or may sell said property, apply the proceeds to such balance due and recover any deficiency thereof from the undersigned; in either of such events recovering also a reasonable attorney's fee and cost of suit. In the event of suit against said purchaser the undersigned also guarantees the payment of costs and a reasonable attorney's fee to said assignee, its successors and/or assigns.

Dated at San Francisco 1952 By Cook & Sons, Inc.
SELLER SIGN HERE
Charles E. Cook
TITLE

SELLER'S ASSIGNMENT AND WARRANTY OF TITLE

FOR VALUE RECEIVED, the undersigned does hereby sell, assign and transfer WITHOUT RECOURSE to

his, its, or their right, title and interest in and to the within contract, the property described, and all moneys to become due thereunder. The undersigned warrants that the title to the aforesaid property vests in the undersigned; that the undersigned has a right to make this assignment; and that the aforesaid property is free from liens and/or encumbrances.

The undersigned represents that the within contract arose from the bona fide sale of the property according to terms described therein and that said property has actually been delivered into the possession of the purchaser therein named.

September 22, 1952
Dated September 22, 1952 We hereby acknowledge receipt of \$ 7737.95 from Cook & Sons, Inc.
Bank of America BY Assistant Cashier
SELLER SIGN HERE
TITLE

1952

APPLICATION FOR REGISTRATION CERTIFICATE FOR
TRUCK, TRAILER, SEMI-TRAILER, BUS, TRACTOR, OR
OTHER VEHICLE REGISTERED BY UNLADEN WEIGHT

1952

TYPEWRITE OR PRINT PLAINLY

Indicate Class DUMP TRUCK	Alaska Title No. D. 14555	1952 License No. C-TR 62313
Registered Owner Mahlon J. Connett		
Residence Address Gen. Del.		P. O. Box No.
Business Address Gen. Del.		
City Fairbanks		Terr. or State Alaska
Motor No. RD450-18333		Serial No. 1252
Make International		Type Dump
		Year 1952
Used <input type="checkbox"/> New <input checked="" type="checkbox"/> If new, date of sale by dealer April 25, 1952		
Indicate if vehicle is specially constructed, reconstructed, or foreign vehicle.		
WEIGHT (actual combined weight—manufacturer's advertised weight)— 41,000		
UNLADEN 18,500 Lbs. A new Registration Certificate must be obtained and additional fee paid, if unladen weight increased over previous maximum registered weight.		
Lien Holder Bank of America		Date of Lien Apr. 25, 1952
Address 6551 Van Nuys Blvd.		Amount \$8,500.00
City Van Nuys		Terr. or State Calif.
Signature of (in ink) Registered Owner Mahlon J. Connett		

FOLD ON THIS LINE

When validated, numbered, and registered owner has signed on line indicated, this form becomes your registration certificate. Expires Dec. 31, 1952 or when vehicle sold.

License plate must remain with the vehicle when sold. (New Registration Required)

I hereby certify that the above statements are true and correct to the best of my knowledge and belief.

Mahlon J. Connett
Signature of applicant

Date **April 25, 1952**

Any False Statement in this Application Subjects the Applicant to Prosecution

If registering a used car for the first time in Alaska, the vehicle must be inspected by the Highway Patrol, Deputy Marshal or other peace officer. See Form Deptax MV 150.

LICENSE FEES:	
8,000 pounds or less	\$15.00
8,001 pounds to 12,000	\$25.00
12,001 pounds to 18,000	\$30.00
18,001 pounds and over	\$75.00
Owner's responsibility to furnish true and actual weight subject to Commissioner's approval.	

Notify this Department within 10 days of any change in name or address.

ISSUE ONE PLATE ONLY FOR TRAILERS
(Tax Commissioner's Use Only)

Fee Paid \$ **75.00**

Received by **D. Foley**
at **Juneau Alaska**
Date **5-6, 1952**
Deputy or Agent

SURRENDER THIS CERTIFICATE WHEN APPLYING FOR NEW REGISTRATION

DEPARTMENT OF TAXATION — TERRITORY OF ALASKA

Box 2751

(Deptax MV - 150A)

Juneau, Alaska

204 Air Stamp

86

[Title of District Court and Cause.]

CLERK'S CERTIFICATE—
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10(1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75(g) and 75(o) of the Federal Rules of Civil Procedure and the designation of counsel for the defendant-appellant, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action or proceeding. Reporter's transcript to follow when furnished.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco 1, California, from Judgment filed and entered in the above-entitled cause by the above-entitled court on the 24th day of September, 1958.

Dated at Anchorage, Alaska, this 18th day of November, 1958.

[Seal]

WM. A. HILTON,
Clerk;

By /s/ PRISCILLA FERGUSON,
Chief Deputy.

[Endorsed]: No. 16273. United States Court of Appeals for the Ninth Circuit. Cook and Sons Equipment, Inc., Appellant, vs. Morris Killen, Appellee. Transcript of Record. Appeal from the Court for the District of Alaska, Third Division.

Filed: November 25, 1958.

Docketed: December 8, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 16,273
United States Court of Appeals
For the Ninth Circuit

COOK AND SONS EQUIPMENT, INC., VS. MORRIS KILLEN,	}	<i>Appellant,</i> <i>Appellee.</i>
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Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF OF APPELLEE.

BAILEY E. BELL,
WILLIAM H. SANDERS,
JAMES K. TALLMAN,
Central Building, Anchorage, Alaska,
Attorneys for Appellee.

FILED

JAN 4 1905

PAUL P. O'BRIEN, CLERK

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No. 16,273

**United States Court of Appeals
For the Ninth Circuit**

COOK AND SONS EQUIPMENT, INC.,	}
<i>Appellant,</i>	

vs.

MORRIS KILLEN,	}
<i>Appellee.</i>	

**Appeal from the District Court for the
District of Alaska, Third Division.**

BRIEF OF APPELLEE.

JURISDICTIONAL STATEMENT.

We adopt the jurisdictional statement made by the appellant herein, in lieu of re-incorporating it in this brief.

STATEMENT OF THE CASE.

We have carefully read the statement of the case as set forth in appellant's brief by the Honorable Edgar Paul Boyko and have also read his statement of facts. It is regrettable that we are required to make a separate statement of the case and the facts, due to the fact that the statement made by the Honorable Edgar

Paul Boyko is so far from correct that it is misleading.

The statement on page 6 that the truck was used during an entire summer construction season is not true, and the evidence shows that it was only used for one week. (TR 40.)

On page 7 of appellant's brief, there is a statement: "shortly thereafter Connett defaulted, both in his contract with Killen and on the payments to the Bank of America". We call your attention to the fact that this default did not occur until late September, as three payments of over Four Hundred Dollars each were paid, amounting to \$1,206.00. (TR 76.)

Then, on page 8, there is a statement, "presumable in anticipation of possible action to repossess". This is a creation of an ingenious mind, coupled with wishful thinking, as there is no evidence to even create a presumption of that kind.

On page 9 there is a statement that "at no time did he attempt to contact either the appellant or Cook and Sons, Inc., or the Bank of America".

It is quite clear, by the evidence, that Mr. Killen hired attorneys in the State of California to try and locate Connett and to try to find the truck. Naturally, it could be presumed that the investigation made in California brought Mr. Cook and his son to Alaska to try to get a release from Mr. Killen, as Mr. Killen testified.

We are setting out the evidence below for the convenience of the Court, and we will try to set forth the

facts as included in the part of the testimony that was transcribed and included in the transcript of record, which is as follows:

STATEMENT OF THE FACTS.

The plaintiff, Morris Killen, filed a complaint in the district Court at Anchorage, Alaska, on October 20, 1953, in which the plaintiff alleged that Charles Cook and Charles Cook, Jr., doing business as Cook and Sons Equipment Company, in the State of California, as defendants, wrongfully stole, took, and carried away from the Territory of Alaska one (1) certain truck automobile; namely, one (1) International dump truck, Model 1952, Motor No. RD450-18333, Serial No. 1252, of the value of \$17,000.00, which was the property of the plaintiff. (See complaint set forth in Transcript of Record.)

The defendants were personally served in Alaska, near Anchorage. An answer was filed by Charles E. Cook, Jr. and Charles E. Cook, III, individually, and doing business as Cook and Sons Equipment Company, Inc. This answer alleged that Charles E. Cook, Jr., was the president of Cook & Sons Equipment Company, Inc., a California corporation, and that Charles E. Cook, III was a stockholder. Then an Answer for the corporation—Cook & Sons Equipment Company, Inc. was filed. We refer you to the answer printed in the transcript commencing on page 5. This corporation was never made a party as such.

The case came on for trial before the Honorable Albert L. Reeves, a visiting judge from Kansas City,

Missouri, having been assigned here by the Chief Justice of the Supreme Court of the United States. The principal defendant, Charles E. Cook, Jr. was called as the first witness, identified himself as one of the defendants in the action, and stated that he was Charles E. Cook, Sr. and the other defendant was Charles E. Cook, III. (See TR 33-34.) He admitted that he took the truck without the consent of anyone, and a local garage man assisted him.

Morris Killen was not in Alaska at the time, but Morris Killen's minor son was taking care of the place. There was no one at home at the time the truck was taken. Other equipment was dragged out of the way, and the truck was started by wiring across the ignition. Mr. Cook then left with the truck immediately. He crossed the border into Canada at daylight the next morning.

Mr. Cook testified that he had never seen Morris Killen before he took the truck and had given notice to no one that he intended to take it; that he had been in the Territory only a few days before he took it; that he was president of a corporation known as Cook and Sons Equipment Company, Inc. (TR 36.)

Morris Killen was called as a witness and testified that he owned and operated the Big Timber Lodge, which was stocked. There was a store, a restaurant, a night place and a bar. He handled gasoline. Regular family-served meals were offered in the cafe; there were approximately thirty-five (35) regular boarders, who were truck drivers on the road.

Mr. Killen further testified that on the 25th day of June, 1952, he entered into a contract with Mahlon J. Connett. The contract was offered and admitted in evidence, is an exhibit in the case, and is marked plaintiff's exhibit one. (We have carefully checked the transcript of record in this case and do not find this exhibit.) The contract provided for the trade of the truck, free and clear of all encumbrances, to Morris Killen for his business known as Big Timber. The truck was a Twin-screw LL-190, and the testimony shows that it was absolutely perfect and was new. (TR 40.) *The truck had worked one week when the trade was consummated.* Morris Killen was going into the construction business and intended to use this truck in his business. He had been in that business for a long time prior to owning Big Timber. Mr. Killen turned the Big Timber business over to Connett immediately after the papers were drawn up and delivered. The truck was traded at the value of \$15,000.00, as a reasonable value in the transaction. (TR 41.) He qualified then to testify to the value of the truck; and after qualification, he placed the value at \$15,000.00, including the other *stuff* that was in the truck. He received two (2) tires, tubes and wheels that had never been on the ground. Mr. Connett said he bought them outright and that they were not on a conditional sales contract *with the bank*; that the reasonable value of the tires, tubes and wheels was \$400.00 to \$450.00. Mr. Killen further testified that he received other tools with the truck and place some of his personal tools there also, the value of which was

between \$15.00 and \$25.00. Shortly after the trade he put the truck and all of his equipment away and stacked and winterized it. He stated that it was customary procedure for all contractors to winterize and stack their equipment in a small place, as small a place as they could. (TR 43.) It is done that way because it is usually dug out and serviced before the snow is off, to get it ready for the season. This equipment was stacked at Mr. Killen's home in Anchorage, together with considerable other equipment. (TR 44.) (There was also a D-6 caterpillar in the equipment.) The lot was fenced and was about 60' by 100'. Morris Killen left his son in charge of the house and went outside.

Morris Killen stated that the contract entered into, whereby the sale of the Big Timber Lodge was traded for the truck, provided definitely that Mr. Connett would pay the balance due on the truck and would clear the encumbrances against it within 90 days from the date of the contract. The contract mentioned that the encumbrances to be paid by Mr. Connett were approximately \$7,500.00. No other encumbrance was mentioned. Morris Killen did not know who the truck had been purchased from. The paper recited a balance of something like \$8,500.00, but that \$7,500.00 would pay off the indebtedness by reason of the discount for paying it before it was due. Mr. Connett had paid \$5,000.00, or a little more, plus more than \$1,200.00 for three (3) monthly payments. Morris Killen was ready, willing and able to pay the balance due on the conditional sales contract, had he

known that Mr. Connett had defaulted and had not made the payments as he agreed to do. There was nothing owing on the truck contract until some time in September of that year. Mr. Killen did not know that Charles Cook, or any of his family were involved in the transaction. He was told that the money was due a bank in California; the first information he had that there was a default in the payments due, or that Mr. Connett had not paid off the truck as he agreed to, was about September 20th, when he was called at his mother's home in Texas and told of the truck being taken from his home and having disappeared. No demand was ever made on him for any payment, whatsoever. (TR 48-49.)

Mr. Killen further testified that at the time he made the deal he understood that there was \$8,500.00 due on the truck; Mr. Connett told him that, also showed him the three (3) receipts, or one (1) receipt for three (3) payments, he could not remember which, which amounted to more than \$1,200.00 and which was paid 90 days in advance. (TR 50.) Mr. Connett was to make the payments to the Bank of America in California and give Mr. Killen a clear title, under the agreement. (TR 50.) The papers he took showed a lien to the Bank of America, and they arrived at the pay-off figure of \$7,500.00, if paid off within the 90 days. (TR 51.)

Morris Killen testified on cross-examination that Mr. Connett left Big Timber Lodge; and that he, Morris Killen, took back what was left but he had no stock, blankets, windows, or anything else that he had

left at Big Timber; and he never operated it again. (TR 52-53.) Mr. Killen further testified that he would have paid the balance due on the truck if he had had an opportunity; that he did not contact the bank; that he entertained no doubt but what Mr. Connett would pay the truck off for the investment he had. (TR 51.) Mr. Killen had no idea that Mr. Connett would not fulfill the contract and agreement he had made. (TR 54.)

On redirect examination Morris Killen testified that he had no knowledge that any man by the name of Cook, or any company by the name of Cook, had any interest whatsoever in the deal. The discussion was that the original balance was something like \$8,500.00, and that he had seen receipts for \$1,200.00. That is how he arrived at the figure of \$7,500.00. (TR 54-55.)

On recross examination Morris Killen testified that he never contacted the defendant, Cook and Sons, or any of them; that he did not know of them.

Then, on redirect examination, he testified that he tried to find the people driving the truck on the Alaska Highway. Mr. Killen made a diligent effort, he ruined his vacation, and spent several hundred dollars coming back up the highway to get hold of the truck, but could not find it.

Mr. Bob H. Killen, Dovie Killen, and Virgil Fey testified, but their testimony is *omitted from the transcript*.

Then, Charles E. Cook was called, in his own behalf stated that his name was Charles E. Cook, Jr., that

he had been in Court all during the hearing, that the truck in question was a 1952 new International, six-cylinder, three-axle dump truck. Then, a conditional sales contract was identified; Mr. Cook testified that it was entered into on May 7, 1952; it was marked for identification, introduced in evidence, and a photo-static copy of it is attached to the transcript of the testimony, page 108, and marked Defendant's Exhibit A. Mr. Cook further testified that Mr. Connett was given permission to take the truck to Alaska; that the bank insisted that he make three payments on the balance due before he left California, in order to evidence good faith, for which there was either three or one receipts issued directly by the bank; that a party coming down from Alaska told him Mr. Connett had traded the truck, that was about the middle of September, 1952; that no payment was due until September 20. (TR 60-61.) He came to Alaska about that time and then conferred with them (meaning the Bank of America) later. Upon arriving in Alaska, he looked up Mr. Connett at Big Timber Lodge. He knew that the truck had been transferred; he secured no satisfaction from Mr. Connett; that he came back to Anchorage and went to the home of Morris Killen, and no one was there at the time. Later he talked to the Killen boy. He introduced himself and told him who he was. (TR 63.) Mr. Cook told him he had come to get the truck; that the boy answered that his father and mother were in the States and his father wanted no one using the truck and no one was to touch it. (TR 64.) The boy said no one was to take the truck and that Mr. Cook could not have it. That was the

conversation as Mr. Cook recalled it. Mr. Cook repossessed the truck and kept it and used it in the name of Cook and Sons Equipment Company, Inc. until July, 1957; that he was never contacted by Mr. Killen or Mr. Connett; that he saw Mr. Connett, but Mr. Connett never offered to pay anything. (TR 65.) Mr. Cook further testified that he was back in Alaska about a year later and he did contact Mr. Killen. He pretended that he was trying to buy Big Timber Lodge and had more than one conversation with Mr. Killen relating to the purchase of Big Timber Lodge. Mr. Killen never accused him then of taking the truck illegally. (TR 66.) Mr. Cook testified that he did go to the Killen residence twice; the first time he went, Mr. Gillen was not there; the second time he had another fellow with him, who was someone in Anchorage with a tow truck. (The foregoing sentence relates to the actual picking up of the truck.) Mr. Cook employed the fellow with the tow truck to go with him to the Killen place. (TR 68.) Mr. Cook testified that he had had lots of experience, approximately fifteen years, in handling heavy equipment, a great deal of experience in picking up vehicles that were hidden away or that the police had in difficult spots to pick up. It was not an unusual circumstance for him. Then Mr. Cook drew a diagram of the Killen place. It was introduced in evidence but is not shown in the transcript of the testimony.

Mr. Cook further testified that he had the tow truck back up to the pick up; it picked up the rear end by means of jacking up the rear wheels, and

moved it sidewise. The truck was locked and he had no key. Mr. Cook very easily opened the cab of the truck, wired it across around the key and entered the truck. He started the truck and moved it back and forth, cleared the fence and then backed out and went on. (TR 70.) He took precaution not to damage any of the Killen property; he made a careful inspection to ascertain whether any damage had been done and was satisfied that none had been done. He testified that there was nothing in the cab, no tools of any kind or spare parts. He then described what normal accessories were and the spare parts bought by Mr. Connett in California. (TR 71-72.) He further testified that, to the best of his recollection, this truck transaction with Mr. Connett ran over a period of two or three months while he was attempting to sell it and get it financed, and was actually consummated on the seventh day of May, 1952. Another exhibit was introduced at that time and marked Exhibit B, but it is not attached to the transcript of record. He testified that the value of the truck, in his opinion, was \$14,094; that the contract price referred to was \$13,496.18; that the contract showed on the back: "September 22, 1952, We hereby acknowledge receipt of \$7,737.95 from Cook and Sons, Inc., in full payment of this contract, Bank of America, National Trust Association. Signed by Sally Owen, Assistant Cashier." (TR 75.)

Mr. Cook testified that the Bank of California demanded three (3) monthly payments before they would permit the truck to be taken out of California.

Mr. Connett paid \$1,206.00, which was the approximate amount of three (3) payments. The contract indicated a balance of \$9,685.64; and \$1,206.00 was paid before the truck left California, leaving a balance of \$8,470.00 which amount was reduced for prepayment of unearned interest down to \$7,737.95.

On cross-examination Mr. Cook testified that he got the contract back about the 23rd or 24th of September. It was mailed to him in Anchorage and he received it by General Delivery at the Anchorage post office. He showed the contract to the attorney in Moody & Kay's office before he took the truck. He had been in Anchorage long enough to go to Big Timber and see Mr. Connett, who told him that he was not going to pay for the truck. Mr. Connett showed him the contract he had with Mr. Killen and told Mr. Cook where Morris Killen lived. Mr. Cook later saw Mr. Connett in California the same year; he had always been a dump truck operator and still is, so Mr. Cook believes. Mr. Connett was engaged in business in California but did not operate the truck in the business, Cook and Sons, Inc. It was operated by Cook and Sons, Inc. from the time he reached California with it. Mr. Cook sold it in July, 1957 to Mr. Leroy Chriseana. Mr. Cook came back to Anchorage after he took the truck in 1953. He talked to Mr. Killen; he drove to Homer to see him and his son was with him. Mr. Cook talked to Mr. Killen on the telephone from Homer to Anchorage; he talked to Mr. Killen in Anchorage later; he drove up here in 1953. He did not talk to Mr. Killen about signing a release over the

truck deal. Mr. Connett showed Mr. Cook his contract with Mr. Killen for the Big Timber Lodge in the Parsons Hotel. He made an offer of \$1,500.00 as the down payment, he believes. He remembered Mr. Killen telling him that he had attorneys in California trying to find Mr. Connett.

Mr. Cook further testified that the Killen boy told him not to touch the truck and that his father was out in the States. When he went away from the Killen boy, he got someone with a tow truck to help him. He returned to the Killen home sometime after one o'clock; he knew that the boy was going to work at one o'clock and that Mr. Killen and his wife were not in Anchorage. The Killen boy told him that he would have to be at work at one o'clock; he did not see anything of the Killen family at the time he took the truck; he wired across the ignition and got the motor started. To stop it he would remove the wire; he operated it that way. He talked to no one in Anchorage after he got the truck, not to his attorney or anyone. He left Anchorage about 2, 3 or 4 o'clock. It was still daylight in September, the 24th or 25th. He did not see Mr. Connett when he went by the Big Timber Lodge. He did not stop; he had seen him two or three days before. Mr. Cook went through Tok and over to the border and had to wait for it to open up in the morning. He drove home in six days. When he went to Killen's place, he did so with the intention of taking the truck; that in his opinion the value of the truck when he sold it was \$13,496.18; Mr. Connett or Mr. Killen could have paid the debt off and received

the same discount. It was an excellent truck. He imagines that Eight Hundred Dollars would be about the right amount for freight charges from California to Anchorage. Then the defendant rested and Morris Killen was recalled.

Morris Killen testified about the spare wheels, tires and tubes; and he made this statement: "When I went Outside; when I stacked the equipment the tires, tubes, and wheels were in the back of the truck, and some of the parts referred to were in the cab of the truck. The axles were in the back of the truck, and this truck was never used one hour, just driven down, and there was some grease that came with the truck that I never used, and other things from Big Timber that was brought to my yard and stacked." He further testified that the tires, tubes and wheels and the axles were there, as well as miscellaneous tools, oil filters and points; and they were in the cab of the truck, locked up. He stated that he had no conversation with Mr. Cook at any time about Big Timber Lodge; that Mr. Cook and a man that was said to be his son tried to get a release from him, offered him Five Hundred Dollars and to pay the attorney's fees. This release was over the Connett deal concerning the truck.

Then on cross-examination, the application for registration certificate in Alaska for the year 1952 was received in evidence as Defendant's Exhibit C; and it is found in the transcript at page 110. (TR 98.)

Mr. Killen further testified that he went out to Texas some time in August; that the truck had been

at his home place, parked as described above, for a month.

This concludes all of the important part of the evidence that was transcribed, and specifically omits the testimony of several witnesses who testified to very material things.

ARGUMENT.

Before answering the argument set forth in the brief of the appellant, we wish to renew our motion to dismiss the appeal for all of the reasons set forth in the motion which was filed, and by this Court overruled.

(A) That the appeal is not a meritorious one, but is taken merely to delay plaintiff's action in making a collection of the judgment.

(B) That no defendant in the case has made any effort to appeal, and the notice of appeal filed was only filed by a corporation which was not a party to the law suit.

(C) That Cook and Sons Equipment, Inc., appellant, is not a party to the law suit. The real judgment debtors are Charles Cook and Charles E. Cook, Jr., doing business as *Cook and Sons Equipment Company, Inc.*, of the State of California, and there was not the slightest mention on the plaintiff's part to the effect that Cook and Sons Equipment, Inc. was ever sued in the case, or ever became a party in the case.

(D) That the appeal was not filed within the time provided by Rule 73, subdivisions (b) and (g) of the

Federal Rules of Civil Procedure and was not docketed within forty (40) days after the notice of appeal was filed.

(E) No notice of appeal was ever given by any judgment debtor; but the notice of appeal was given by a corporation who was not a party to the judgment.

We will ask the Court to give consideration to the memorandum filed herein, supporting the motion to dismiss, as we most respectfully contend that the authorities set out in the memorandum support the motion to dismiss.

We call your attention to the mistakes in the statement of the case by the Honorable Edgar Paul Boyko. He was not in the case at the time of the trial, and we can see how he would inadvertently make some misstatements. In a case of this kind it is important, in our opinion, and it is especially true since there is only a portion of the evidence brought up to this Court in the transcript of record, the testimony of several material witnesses being completely left out. The testimony of Mrs. Dovie Killen, Bob H. Killen and Virgil Fey was all given at length, and no part of it is shown in the transcript. Therefore, the appellant cannot raise the question on appeal that "the findings of fact and conclusions of law and judgment were wrong where the record does not purport to contain all of the official transcript and all of the evidence".

ANSWER TO ARGUMENT NO. I.

This argument, stripped of the extra verbiage, amounts to a contention that the Honorable Albert L. Reeves did not have authority to render the judgment that he did render and contends that the express statutory remedy is contained in the uniform Conditional Sales Act; and the Court had authority only to award damages within the authorization conferred upon it by the act just mentioned. Of course we disagree, to-wit: §§ 29-2-17, 29-2-18, and 29-2-19 A.C.L.A. 1949, are a portion of the Conditional Sales statutes of Alaska. I presume counsel relies upon these sections which are found in Chapter 2 of A.C.L.A., 1949 under the heading of Uniform Conditional Sales Act. For the convenience of the Court, I will set out those three sections, which are as follows:

§ 29-2-17.—Notice of intention. Not more than forty nor less than twenty days prior to the retaking, the seller, if he so desires, may serve upon the buyer personally or by registered mail a notice of intention to retake the goods on account of the buyer's default. The notice shall state the default and the period at the end of which the goods will be retaken, and shall briefly and clearly state what the buyer's rights under this act will be in case they are retaken. If the notice is so served and the buyer does not perform the obligations in which he has made default before the day set for retaking, the seller may retake the goods and hold them subject to the provisions of Sections 19, 20, 21, 22, and 23 (§§ 29-2-19-29-2-23 herein) regarding resale, but without any right

of redemption. (L 1919, ch 13, § 17, p 35; CLA 1933, § 3037.)

“§ 29-2-18. Redemption by buyer: Seller to furnish statement of sum due. If the seller does not give the notice of intention to retake described in Section 17 (§ 29-2-17 herein), *he shall retain the goods for ten days after the retaking within the state in which they were located when retaken, during which period the buyer, upon payment or tender of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods, or upon performance or tender of performance of any other promise for the breach of which the goods were retaken, and upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred.* Upon written demand delivered personally or by registered mail by the buyer, the seller *shall furnish to the buyer a written statement of the sum due under the contract and the expense of retaking, keeping and storage. For failure to furnish such statement within a reasonable time after demand, the seller shall forfeit to the buyer ten dollars (\$10) and also be liable to him for all damages suffered because of such failure.*” . . . (Emphasis ours.) * * *

“§ 29-2-19. Compulsory resale by seller: Notice. If the buyer does not redeem the goods within ten days after the seller has retaken possession, and the buyer has paid at least fifty per cent of the

purchase price at the time of the retaking, *the seller shall sell them at public auction in the state where they were at the time of the retaking, such sale to be held not more than thirty days after the retaking.* The seller shall give to the buyer not less than ten days' written notice of the sale, either personally or by registered mail, directed to the buyer at his last known place of business or residence. The seller shall also give notice of the sale by at least three notices posted in different public places within the filing district where the goods are to be sold, at least ten days before the sale. The seller may bid for the goods at the resale. If the goods are of the kind described in Section 8 (§ 29-2-8 herein), the parties may fix in the conditional sale contract the place where the goods shall be resold. (L 1919, ch 13, § 19, p. 36; CLA 1933, § 3039.)"

These sections of the statute contradict the contention of the appellant. We wish to call your attention to a portion of § 29-2-16 A.C.L.A. 1949 which reads as follows:

"... Unless the goods can be retaken without breach of the peace, they shall be retaken by legal process; but nothing herein shall be construed to authorize a violation of the criminal law...."

We now call your attention to § 29-2-25, which reads as follows:

"§ 29-2-25. Recovery of damages by buyer after retaking goods. If the seller fails to comply with the provisions of Sections 18, 19, 20, 21 and 23 (§§ 29-2-18—29-2-21, 29-2-23 herein) after retaking the goods, *the buyer may recover from the*

seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest. (L 1919, ch 13, § 25, p 38; CLA 1933, § 3045.)” (Emphasis ours.)

The rule set forth in 47 Am. Jur. page 151 is as follows:

“As a general rule, the measure of damages for conversion of the property by a conditional vendor after the vendee has made payments on the purchase price is the value of the property at the time of the conversion, less the unpaid balance of the purchase price.”

This above statement described the case at bar here. The testimony is undisputed; Killen accepted the truck in the trade at an agreed price of \$15,000.00, and Connett assumed and agreed to pay the balance due on the truck to the Bank of America.

In all fairness, the trial judge took into consideration the fact of the amount actually paid on the truck, the amount of the balance due thereon, which the defendant proved to be \$7,737.95. (TR 75.) A casual reading of the trial memorandum of the plaintiff (CM 9), which is hereby made a part of this brief by reference as fully as if incorporated herein, and we especially make a part of this brief the memorandum opinion of the Honorable Albert L. Reeves, District Judge, which commences on page 13 and extends over to and includes page 20. (CM.) We also call your attention to the Findings of Fact commencing on page 24 and extending over to and including page 28. (CM.)

These findings of fact cannot be attacked by the appellant due to the fact that the entire transcript of the evidence is not filed herein and is not made a part of the transcript of record. In support of that contention, we cite *Lowman v. Kuecker*, 52 ALR2d 1380; (71 NW2d 586) and we quote a small portion of the opinion from page 1384, as follows:

“... As to assuming facts not in the record, the record we have does not purport to contain all of the official transcript; the trial court heard all of the testimony, overruled the objection and permitted the answer. We are satisfied with the trial court’s ruling.”

In the case of *Genard v. Hosmer, et al.*, 189 NE 46, 91 ALR, page 543, we quote from page 544 as follows:

“Rugg, Ch. J., delivered the opinion of the court:

This is an action of contract. The cause of action is the alleged breach of a covenant in an assignment given by the defendants to the plaintiff. There were two hearings before the same judge of the Superior Court, who made findings and rulings. The evidence is not *reported in full* and the bill of exceptions does not purport to contain a summary of it all; therefore the findings of fact must be accepted as true. . . .”

In the case of *Book v. Book*, 141 Pac.2d 546, 167 ALR 352, we quote from page 358 as follows:

“Even if we were to assume that the order now attempted to be brought here for review was an appealable order and that it was asserted to be a grave abuse of discretion on the part of the trial court in making it, we are unable to see how we

could fairly charge that court with such a misuse of discretion *when we are not supplied* with the oral testimony . . . one filed February 21, 1942 and the other July 30 of that year.”

The case of *Floride Noble, Respt., v. Edward B. Noble, et al.*, 243 Pac. 439, 43 ALR 1235, we quote from page 1236 in part as follows:

“ . . . The appellants also specify a number of respects wherein the evidence is asserted to be insufficient to support the findings of the trial court, but, since the evidence has not been produced upon this appeal, these specifications are also unavailing. . . .”

Another case supporting this contention is *National Nontheatrical Motion Picture Bureau, Inc. v. Old Colony Trust Company*, 169 N.E. 508, 67 ALR 1509, in which syllabus 6 explains the law of that case; and we prefer to cite that syllabus rather than the body of the opinion:

“6. Where evidence upon which a finding of fact by the trial judge was based, is not before the supreme court, the finding is not open to question.”

This case is directly in point; but we feel that the rule is so well settled that it is not necessary to cite additional authorities. However, we deem it advisable to cite the Am. Jur. citations that were used by the Honorable Albert L. Reeves and mentioned in our trial memorandum here, which are as follows:

“47 Am. Jur. 134, Section 927, at page 136 describes the rights acquired by transferee.

“ ‘Rights Acquired by Transferee: Rights of Original Vendor. * * * The rights acquired by a transferee of the conditional vendee include the right of possession the right of acquiring a complete title by payment or tender of the balance of the price agreed upon—even prior to the due date of all the remaining instalments and despite express restrictions against sale, assignment, or mortgage—and the right to redeem the property after default.’ * * * ”

As to the question of the vendors' liability for violation of the vendee's rights, whose rights were acquired by plaintiff Killen as a good faith purchaser, the appellee cites 47 Am. Jur. 150, Section 941, as follows:

“ ‘Vendor's liability for violation of Vendee's rights. * * * A conditional vendor who refuses to grant to the vendee his statutory right of redemption where he is entitled thereto renders himself liable for conversion or statutory penalty. *Like-wise, the vendor is liable to the vendee for damages in retaking the property in an unlawful manner, as by trespass or the use of force, or for the unlawful disposition or resale of the property after repossession, such as by a sale not in compliance with statutes relating to resale, or by failure to sell as required by such statutes.* * * * Under the Uniform Conditional Sales Act, if the vendor, after retaking the goods, fails to comply with the provisions of the Act regarding redemption, compulsory resale by the vendor, resale at option, of the parties where there is no resale, the vendee may recover from the vendor his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have

been made under the contract with interest.’
 * * *” (Emphasis ours.)

We are at a loss to understand the contention of the appellant to the effect that the statutory remedy is in control; conceding, for the sake of argument, that the Alaskan statute does control. Then the decision of the trial judge is absolutely right in every way.

ANSWER TO ARGUMENT NO. II.

This seems to be a rehashing of the argument number I, with some rather unusual statements that are not supported by the evidence.

The case cited—*Mitchell v. Automobile Sales Co.*, 28 S.W.2d 51, 83 ALR 955, does not support the contention of the appellant, and is clearly against appellant’s contention.

There being nothing except wild statements which are contrary to the testimony set forth in the second argument, we do not deem it necessary to answer to any extent since it is contrary to the evidence in the case, and the law cited in the only case is contrary to the contention of the appellant. We will pass on to argument no. III.

ANSWER TO ARGUMENT NO. III.

This argument is also an argument for the lower Court and a similar argument was made there. The appellant cites *Abelleira v. District Court of Appeal*

(Cal., 1941), 109 P.2d 1942; and we finally found this case, not at 1942 but at page 942. It is a mandamus and prohibition suit in which, after reading it carefully through the many pages, I can find nothing that is helpful or even persuasive or in support of appellant's position.

Then appellant cites *Tonningsen v. Odd Fellows' Cemetery Assn.*, 213 P. 760. There is also an error there in the citation, and I ran the index to cases and found a similar case there. I presume it is the one relied upon by the appellant. It is found at 213 P. 710 and is an action in ejectment of certain land in San Mateo County which was used for a cemetery; but I can find nothing in the case to uphold the statements of counsel for appellant.

Then we have a quotation from Section 29-2-25 ACLA 1949. It very clearly implies that the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sums of all payments that have been made under the contract, *with interest*.

The Honorable Albert L. Reeves did exactly that, and we call your attention to his memorandum opinion printed in the transcript, commencing on page 13 and extending over to page 20; and the adoption of the method of determining the damage was exactly right, so we cannot see any merit to argument number III. The wild statements made therein are not supported by the transcript as filed in the case. In another place in the brief, counsel states: "The Act was only intended to protect conditional vendees and their as-

signs against unfair forfeiture and not to lead to their unjust enrichment at the expense of a vendor, acting in good faith, . . .". We call your attention to the fact that the written contract between Connett and Killen provided that Connett would pay the balance due on the truck within 90 days; that Killen turned the property over to Connett and sold him his store, restaurant, night place and bar, including a gasoline station; that they were all stocked; and in fact, Killen stated that "I had quite a stock in there." (TR 37-38.) He turned it over to Connett. Right after the contract was executed, on June 25, 1952, which would have given Connett up to the 25th of September, 1952 to pay off the debt; and the evidence shows that Mr. Cook came to Alaska before another payment matured, three payments having been made in advance; that defendants had not been required to take the paper up from the Bank of America, at that time. But while he was here, he contacted the bank and took up the paper; and arbitrarily and clandestinely, knowing that Morris Killen was out of Alaska, went to his home when there was no one there, and by pre-arrangements, had a garage man with him, who had a tow truck, and took this truck. This was getting quite close to larceny. Then, in violation of the statutes in full force and effect in the Territory of Alaska, ran out and drove the truck through the night and had to wait at the border to clear into Canada on the highway. This is admitted in the evidence, and even that he had been told and knew that Morris Killen's son had to be at work at one o'clock. He waited until

after that hour to do these unholy acts, and yet counsel for appellant will endeavor to put up a smoke screen and attempt to say that the defendants acted in good faith, even though they violated the statutory law of the Territory of Alaska and all moral laws, and took a truck that was worth \$15,000.00 in Anchorage, Alaska, back to the States, concealed it from Morris Killen, and caused Morris Killen to have to employ attorneys in California to locate Connett.

I cannot understand the philosophy of the appellant in attempting to have this Court reverse the District Court at Anchorage by ignoring the written opinion signed by the Honorable Albert L. Reeves (TR 1-3), the findings of fact and conclusions of law (TR 26), and the judgment (TR 29).

We will now hasten on to the fourth argument.

ANSWER TO ARGUMENT NO. IV.

This No. IV is another argument that was made to the trial Court and is not meritorious, in our opinion. They complain about the Court determining that Mr. Killen's equity in the truck was \$6,562.02. This was very simple to arrive at and was supported exactly by the evidence, and in fact, denied by no evidence. The testimony justified the Honorable Albert L. Reeves in that finding, as is disclosed by the memorandum opinion on the merits of the case. The testimony of Mr. Killen was that the truck was of the reasonable value of \$15,000.00 in Alaska; that it was

new and in perfect condition (TR 42); that the spare tires, tubes and wheels were of the reasonable value of \$400.00 to \$450.00; that he had other tools in the truck of the reasonable value of \$15.00 to \$25.00. (TR 43.)

The defendant, Charles E. Cook, Jr., who admitted that he took the truck, fixed the value at about \$14,094.00 and stated that in the contract, the California value, or contract price, was \$13,496.18; admitted that there were many extras with the truck; stated that he paid \$7,737.95 to the Bank of America, National Trust Association, to clean up the balance due on the contract that he had assigned to them (TR 75); admitted that he got it back while he was here in Alaska, and his actions showed conclusively that he got it back for the purpose of taking the truck to California, and showed no inclination to allow the owner to pay the balance due, but, almost like a thief in the dark, took it and ran to California and left Mr. Killen to try to find out where his truck had gone.

The court found, in Finding of Fact No. X, that the reasonable value of the truck was \$14,300.00 at the time the defendants took it from the plaintiff and out of Alaska, and the balance due on the contract was \$7,737.95, leaving the plaintiff's equity in the truck at \$6,562.05, and to that he added the interest at six per cent per annum on that sum from the 27th day of September, 1952 until the day of judgment, which interest came to \$2,362.32 if paid on September 7, 1958, plus all costs of the action, including an attor-

ney's fee as provided by the rules of the District Court of the Territory of Alaska, and by said rules, plaintiff was entitled to recover attorney's fee of \$678.48.

The honorable trial judge certainly had the evidence before him to justify his findings, and, in his memorandum opinion, on page 13, he clarified all of the details, and it seems to me that Argument No. IV is nothing more than an argument to be made to the trial court at the time, since it is based upon the argument that was made and both plaintiff and defendant testified that the truck was in perfect condition. Counsel for the defendant injected into this fourth argument so many things that are not included in the evidence and should not be considered, as they are purely counsel's own ideas and were not even argued by the trial lawyer representing the defendants when the case was tried. Counsel for the defendants makes the statement "and probably used up its accessories for an entire Alaska construction season"; he knows that is not a fact and should not attempt to make such a statement in view of the testimony that it was only worked one week after it reached Alaska. He attempts to assume the conditions of the Alaskan Highway, and makes a shocking remark about it, when there is no evidence to justify such assertions. He also makes a statement to the effect that automotive equipment brought into Alaska over the Alaskan Highway depreciates in value, when there is no evidence to support such a statement. The

\$800.00 being the reasonable cost of bringing this truck to Alaska was a fair deduction by the trial court, since both plaintiff and defendant testified to that. He objects to the judgment of the court over on page 20, in the allowance of interest on the new value of the truck, including the \$800.00 transportation item. Nowhere is there any evidence to contradict this matter.

We have studied the case of *C. W. Raymond Co. v. Kahn*, 145 N.W. 164, 51 LRA (ns) 251, and the case has no bearing whatsoever on the questions raised here. We have noticed that the appellant has quoted nothing from the case; therefore, we had to study it thoroughly and can find nothing that would affect this case.

Counsel for appellant contends that the Alaskan statutes quoted in the memorandum opinion and in this brief should control this case, and in the next breath he says (TR 19): "While it is obviously true that a truck delivered in Fairbanks is worth more than the same truck F.O.B. in Los Angeles", and attempts to qualify it that it must be shipped by conventional means, although he is completely estopped to make such a statement by the testimony of both the plaintiff and the defendant that the truck was in excellent condition at the time it was taken, and the honorable trial judge gave the defendants the benefit of the doubt and fixed the value of the truck at \$14,300.00, instead of the \$15,000.00 testified to by Mr. Killen, and was, in our opinion, very fair to the de-

fendants, who had put themselves in such a position by taking this truck out of the Territory of Alaska in violation of law and depriving the owner of the use thereof. All equity and good conscience were against the defendants as far as the facts were concerned, and we feel that Argument IV is purely irrelevant and should not affect this honorable court in the least.

ANSWER TO ARGUMENT NO. V.

If you will notice the record, there were so many Charles Cooks involved in this operation, and they were sued as a partnership, doing business as Cook and Sons Equipment Company in the State of California, and the word "corporation" was not mentioned. Just who the real partnership was remained more or less a mystery, although Charles E. Cook testified that he was the oldest of the other two (implying all three of them were members); stated he was Charles E. Cook, Sr. (TR 34), referred to Charles E. Cook, III as his son, and at the close of the evidence, no motion was made to dismiss the case as to the other partners, but he answered in the case for Charles E. Cook, Jr. and Charles E. Cook, III individually and doing business as Cook and Sons Equipment Company, and then added the word "Inc." (TR 5-6.) He filed an answer for a corporation that was not made a party to the action and failed to allege the necessary allegations to get it in good standing under the laws of the Territory of

Alaska and under the Federal Rules of Civil Procedure. It is a well established rule of law—so well established that no citations are requested—that individuals may act for and on behalf of a corporation in such a way that they themselves become liable, and in this case the evidence points to that conclusion, and therefore all of the judgment debtors are properly included in the judgment.

No objection having been stated in the trial court to the inclusion of Charles Cook, III, and the first time that we know of this being mentioned was in this brief in Argument V, and the appellant not having furnished a transcript of the evidence in this case and filed it in this court, it is too late to raise that question for the first time on this appeal, and while these designations, Charles E. Cook, Sr., Charles E. Cook, Jr. and Charles E. Cook, III, are confusing, the defendants never went to the trouble to clarify their identity and the judgment insofar as it included Charles E. Cook, III, should not be disturbed on this appeal, as there is no place in the record showing that Charles E. Cook, Jr. appealed at all from the judgment rendered. The only notice of appeal that was filed, and the only one we know anything about, is found on page 31 of the transcript, and that notice of appeal (being jurisdictional) was given only by Cook and Sons Equipment, Inc., which did not appear anywhere in the trial of the case or the judgment. Nowhere did Charles E. Cook, III give any notice of appeal in this case, and therefore the question raised by Argument V is not before this Honorable Court.

Appellee, having fully replied to the brief of the purported appellant, asks that the purported appeal be dismissed and the judgment of the trial court be affirmed.

Dated, Anchorage, Alaska,
December 3, 1959.

BAILEY E. BELL,
WILLIAM H. SANDERS,
JAMES K. TALLMAN,
By BAILEY E. BELL,
Attorneys for Appellee.



No. 16,275 ✓

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEAN EJNARD BJORSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

**Appeal from the United States District Court for the
Northern District of California,
Southern Division**

CLARK A. BARRETT

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FILED

MAY 14 1959

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No. 16,275

United States Court of Appeals
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BRIEF FOR APPELLANT

**Appeal from the United States District Court for the
Northern District of California,
Southern Division**

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division. (TR 9-11)¹ The District Court had jurisdiction pursuant to Title 18, United States Code, Section 3231. The indictment

¹ Numbers preceded by "TR" denote the applicable pages of the Transcript of Record.

ment charged an offense in violation of the Universal Military Training and Service Act (Title 50, United States Code App., Section 462). (TR 3-4) This Court has jurisdiction of this appeal pursuant to Rules 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure as the notice of appeal was filed in the time and manner required by law. (TR 11-12)

STATEMENT OF THE CASE

Appellant was charged by an indictment alleging that on or about October 21, 1957, he knowingly refused and failed to comply with the order of his Selective Service Local Board to report to said board "to be given instructions to proceed to a place of employment designated by said Local Board No. 30 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest," as provided in the Universal Military Training and Service Act and the rules and regulations made pursuant thereto. (TR 3-4)

After pleading not guilty and waiving trial by jury, appellant was tried by the Court on August 7, 1958. (TR 6-8) His entire Selective Service file was received in evidence as Plaintiff's Exhibit 1. (TR 19) It was stipulated that appellant failed to report to his local board on October 21, 1957, as ordered. (TR 18) Appellant was found guilty as charged on August 7, 1958 (TR 49), and was sentenced to imprisonment for one year on October 21, 1958. (TR 54)

Appellant became eighteen years of age on May 2, 1950, and registered with his local board in Richmond, California, the same day. (F 1, 2)² On May 11, 1951, he completed his classification questionnaire in which he indicated, *inter alia*, that he had been an ordained minister of Jehovah's Witnesses since 1946, was then attending

² Numbers preceded by "F" appearing in parentheses herein refer to the pages of the Selective Service file (Plaintiff's Exhibit 1). Such page numbers, written in longhand, generally appear at the bottom of each page in the file.

the Albany Theocratic Ministry School in Albany, California, that he had no business or employment "aside from Ministry," and certified that he was a conscientious objector. (F 6-11) His special form for conscientious objector was filed May 21, 1951. (F 12, 23-27) He was classified I-A by his local board on May 28, 1951. (F 12) In spite of a recommendation by the Hearing Officer that appellant be granted conscientious objector status (F 37), the appeal board continued his I-A classification on July, 23, 1952. (F 12, 42)

Appellant was subsequently classified IV-F for physical reasons from August, 1952, to July, 1953, at which time he was again classified I-A. (F 12, 44, 65-66) He refused to submit to induction as ordered in August, 1953 (F 12, 80, 82), and was subsequently tried and convicted of a felony based upon such refusal on February 19, 1954.³ The late District Judge Edward P. Murphy sentenced appellant to a fine of \$2,000.00 and a two-year suspended sentence. (F 13, 99) On March 9, 1954, he was sentenced to two years' imprisonment for failure to pay said fine. (F 103)

Appellant was classified IV-F by his local board on April 13, 1954, by reason of his conviction. (F 13) After serving ten and one-half months imprisonment he was released on parole on February 27, 1955; his parole terminated April 7, 1956. (F 104, 149)

On June 27, 1956 (presumably at the request of the Local Board, although the file does not so indicate), the United States Army Recruiting Main Station in San Francisco, wrote to the Commanding General, Sixth Army, a "Request for Determination of *Eligibility for Induction*" concerning the appellant herein.⁴ (F 138-140) Item 14 of said request contains a statement by the investigating officer that appellant was "Considered Acceptable for Military Service." (F 140)

³ *United States v. Bjorson*, United States District Court, Northern District of California, Southern Division, Criminal No. 33757.

⁴ In this instance, as in all others in this brief, emphasis is supplied.

The Commanding General, Sixth Army, by his Acting Assistant Adjutant General, recommended approval of said request in his first indorsement to the Adjutant General, Department of the Army in Washington, D. C. on June 28, 1956. (F 141)

The next persons to consider appellant's eligibility for induction were those comprising the "Joint Induction Screening Group," as representatives of the Army, Air Force, Navy, and Marine Corps. All of said representatives approved the aforesaid request on July 12, 1956. (F 136)

The Secretary of the Army formally approved the request for waiver of appellant's previous conviction on July 13, 1956, in a second indorsement addressed to the Commanding General, Sixth Army. Said approval was couched in the following words:

"1. Request for waiver of civil record is approved and *induction* into the *Armed Forces* (Army, Air Force, Navy or Marine Corps) is authorized provided otherwise qualified. This is *not* to be construed as authorization for *induction* into any *armed service* not currently accepting personnel for *induction*." (F 134)

The Commanding General, Sixth Army, forwarded this letter and the action of the Joint Induction Screening Group to the Army Recruiting District on July 19, 1956. (F 134) On July 20 the original investigating officer signed a certificate of acceptability, noting that appellant had been "Found fully acceptable for *induction* into the *Armed Forces*." (F 167)

By August 21, 1956, appellant was again classified I-A by his local board. (F 13) On August 28, 1956, he sent a letter requesting a personal appearance before the board. (F 170) Out of an abundance of caution he also wrote a separate letter requesting an appeal from said I-A classification on the same date. (F 169) The local board records note the receipt of both of these letters. (F 13) Following his personal appearance on September 11, 1956,

at which time he presented a great deal of documentary evidence concerning his ministerial activities, appellant was reclassified I-O by the local board. (F 13, 173-188)

On September 19, 1956, appellant addressed a letter to his local board appealing his I-O classification. (F 198) The appeal board confirmed his I-O classification on July 18, 1957. (F 13, 213)

The local board forwarded SSS Form No. 152, special report for Class I-O registrants, to appellant on July 25, 1957 (F 13, 213), *more than one year* after the Secretary of the Army had considered and approved the request for determination of appellant's eligibility for *induction* into the *Armed Forces*. Paragraph two of said special report mentions, for the first time since appellant's registration in May of 1950, any requirement for *civilian work in lieu of induction*. (F 213) Appellant returned this report, uncompleted, on August 5, 1957. (F 216)

On August 10, 1957, appellant was given three choices of civilian work which he might perform. (F 219) He refused all of them on religious grounds. (F 220) At a subsequent meeting with members of the local board and the representative of the State Director, on September 16, 1958, the appellant reaffirmed his position. (F 227-228) The *next day* the local board determined that employment as an institutional helper at the Los Angeles County Department of Charities would be appropriate for appellant, and requested authority to order him to work there. (F 229) The Director of the Selective Service System approved this request on October 3, 1957. (F 234) The letter of transmittal of this authorization from that State Director to the local board reads in part as follows:

"A copy of the letter of instructions to the registrant should be mailed *to the agency selected* at least four days in advance of the date set for the registrant to report to the office." (F 235)

The local board's order to report for civilian work,

dated October 9, 1957, notified appellant that he had been "assigned" to the Los Angeles County Department, and specified that he was to report to receive instructions on October 21. (F 237) As previously mentioned, it was stipulated that the appellant did not so report.

In the entire Selective Service file, there is only one document that indicated any action by the Los Angeles County Department of Charities. This is the statement of employer found on the bottom of the aforesaid order to report for civilian work. The only notation on this undated statement is the typewritten phrase "DID NOT REPORT." (F 239)

QUESTIONS PRESENTED AND HOW RAISED

I.

Whether the appeal board denied the IV-F classification without basis in fact contrary to Section 1622.44 of the Selective Service Regulations, resulting in the I-O classification being arbitrary, capricious and contrary to law and making the final order to do civilian work void.

This question was raised by the motion for judgment of acquittal. (TR 36, 40-41, 47-48)

II.

Whether a waiver authorized by the Secretary of the Army, expressly limited to induction into the Armed Forces, may be construed to be a waiver as regards civilian employment in a municipal agency.

This question was raised by the motion for judgment of acquittal. (TR 34, 37-38, 47)

III.

Whether the evidence produced at the trial was legally insufficient to support the judgment of guilty.

This question was raised by the motion for judgment of acquittal. (TR 34, 37)

SPECIFICATION OF ERROR

The District Court erred in denying appellant's motion for judgment of acquittal duly made at the close of the Government's case. (TR 33-41) Grounds in the motion are made the basis of the statement of points on appeal. (TR 15-16)

ARGUMENT

Introduction

The order to report for civilian work, the violation of which was the basis of the indictment in the present case, can only be valid if both of two assumptions are true:

(1) That the Universal Military Training and Service Act allows waivers of prior felony convictions under any circumstances, and

(2) That, if such waivers are possible, either (a) the Secretary of the Army's waiver was sufficient under these circumstances, or (b) no waiver at all was required from the Los Angeles County Department of Charities.

The appellant believes that his conviction must be reversed as neither of the aforesaid assumptions is valid.

I. Section 6(m) of the Universal Military Training and Service Act does not provide for discretionary waivers of prior felony convictions by the Armed Forces or civilian agencies.

Appellant is familiar with the decision of this Court in *Korte v. United States*⁵ in which it was held that Section 6(m) of the Universal Military Training and Service Act⁶ (hereinafter referred to as the Act) does provide for discretionary waivers of prior felony convictions. A petition for certiorari to the United States

⁵ 260 F.2d 633 (9th Cir. 1958), cert. denied, 79 S.Ct. 313, 3 L. Ed.2d 301 (1959).

⁶ 50 U.S.C.A. App. § 456(m).

Supreme Court has been denied. Although appellant believes that the issue involved was a substantial one of national importance, and regrets that certiorari was not granted in that case, he will not press that point here.

II. A waiver by the Secretary of the Army, expressly limited to induction into the Armed Forces, does not encompass civilian employment in a municipal agency.

Even if it be assumed that the Act may permit waivers to be granted of prior felony convictions, it does not follow that the waiver was adequate in this instance. Unless it appears that either no waiver whatsoever was necessary, or that the waiver by the Secretary of the Army was sufficient, the local board had no basis in fact for denying appellant the IV-F classification which was otherwise required by Section 1622.44 of the Selective Service Regulations.

A. The Secretary of the Army cannot, without express authorization, grant waivers for any other agency than the armed service under his jurisdiction.

At the time the Secretary of the Army authorized the waiver of appellant's prior felony conviction on July 13, 1956, his authority derived from Title 5, United States Code, Section 181-4(a), the pertinent parts of which are as follows:

"Except as otherwise prescribed by law, the Secretary of the Army shall be responsible for and shall have the authority necessary to conduct all affairs of the Army Establishment, including but not limited to those necessary or appropriate for the training, operations, administration, logistical support and maintenance, welfare, preparedness, and effectiveness of the Army, including research and development, and such other activities as may be prescribed by the President or the Secretary of Defense as authorized by law."

Obviously, the Secretary of the Army could not authorize the induction of any registrant into any of the other armed services without its consent. Although the Army has been named the executive agent of the Department of Defense respecting the procurement of manpower for the Armed Forces, no branch of the Armed Forces may, on behalf of any other service, waive the disqualification arising from a registrant's prior felony conviction without express authorization.

The Joint Induction Screening Group as originally established had representatives of all four branches of the armed services. It was established for the purpose of allowing each branch of service to determine whether moral waivers of prior felony convictions should be granted to Selective Service registrants. After nearly a year of operation, the Department of the Air Force waived its right to have its own representative on the Screening Group and agreed to accept the decisions of the Army's representative (Department of the Air Force, COMMENT No. 1-Joint Induction Screening Group, dated October 21, 1952).⁷ Without this express waiver, the Army representative could not possibly act on behalf of the Air Force. If this is so, on what basis can the Secretary of the Army be assertly endowed with the power to act for the Director of the Los Angeles Department of Charities? Neither the Act nor any of the regulations promulgated pursuant thereto can be construed to mean that the President or Secretary of Defense can authorize the Secretary of the Army to act for or waive the rights of an agency of the Los Angeles County government. The appellant is aware of no authorization by that department, or any other civilian organization or agency, which enables the Secretary of the Army to act for it in these circumstances. If such exist, the Government's trial record is devoid of them.

The only documents indicating correspondence with the Department of Charities by any of the armed services or

⁷ Set forth as Appendix A of this brief, *infra*, p. 20.

the Selective Service System is the notation that the local board forwarded copies of the order to report for civilian work on October 17, 1957 (F 14), and that the statement of employer was completed and returned subsequently. (F 239) Indeed, the natural import of the language in appellant's file would even negative any assertion that there might have been an implied waiver in this case; the letter of October 7, 1957, from the State Director to the local board refers to the agency "selected" (F 235), and the order in question specifies that the appellant had been "assigned" to this particular employer. (F 237) There is absolutely no evidence that the Department of Charities participated in any way in such selection or assignment. This is further established by the fact that the next day after appellant refused the civilian service offered, he was assigned to the civilian employer in question. (F 227-229)

B. A waiver of a prior felony conviction limited by its terms to induction into the Armed Forces cannot operate as a waiver for civilian employment in lieu of induction.

As was pointed out in the Statement of the Case, *supra*, each and every document concerning the waiver under discussion, from the initial request by the local recruiting office in San Francisco to the final certificate of acceptability which was forwarded to appellant's local draft board, speaks of nothing but induction into the armed services. The initial request sets the tone of the proceedings with the statement that the registrant is "Considered Acceptable for Military Service." (F 140) No mention is made that consideration was given to civilian service in lieu of induction. The entire series of correspondence and indorsements is limited to military personnel considering the desirability of waiving appellant's prior felony record as far as actual service in the Armed Forces is concerned. It is difficult to imagine language that would more ex-

pressly limit the waiver to actual induction than that used by the Secretary of the Army and contained in the certificate of acceptability.

Appellant believes that the military personnel involved in the granting of the waiver in question did not consider any possible service in lieu of induction for two reasons: one, that this possibility was never presented to them, and two, that they implicitly realized they did not have authority to issue such a waiver binding upon a civilian agency. A review of the Selective Service file in this case indicates that at the time the request for waiver was made in June, 1956, appellant had had only two classifications in his life—I-A from May 28, 1951 to April 13, 1954 (except for a nine-month period in 1952 and 1953 during which he was classified IV-F for physical reasons), and IV-F by virtue of his prior conviction. Therefore, at the time the Secretary of the Army considered this request, there was nothing to indicate that appellant would not be again classified I-A by his local board—as he actually was a month after his certificate of acceptability was received. It was not until appellant was granted a personal appearance by the local board and presented no less than fourteen letters concerning his ministerial activity and beliefs (F 173-188) that he was reclassified I-O. As previously noted, more than a year had elapsed from the time of the Secretary of the Army's waiver before the file discloses any reference to civilian work.

In considering Section 6(m) of the Act, the regulations, the language of the Secretary of the Army's waiver, and the total lack of anything in the record to indicate that the Department of Charities did or did not, expressly or impliedly, waive appellant's prior record, if the evidence in support of this conviction is questionable, the presumptions should be resolved in favor of the registrant. As this Court stated in *Franks v. United States*:⁸

"In a criminal prosecution of this kind, the burden

⁸ 216 F.2d 266 (9th Cir. 1954), at page 269.

is on the Government to establish the validity of the induction order, and if the matter which we here mention has a bearing on that validity, then *we must view the record in the light most favorable to the appellant . . .*”

See also *United States v. Fielder*⁹ in which it was held:

“ . . . the registrant has not clearly established that the Board was actually prejudiced but neither has the Government satisfactorily proved to the court that the remarks made did not express the actual feeling or attitude of at least one member of the Board which made the decision as to defendant’s classification. *Any doubt, in a case of this kind, must be resolved in favor of the defendant.*”

In *United States v. Alvies*,¹⁰ Judge Carter (the author of the *Korte* opinion) cited many cases in support of the proposition that

“Where the record of selective service board action in classifying a registrant is questionable, presumptions are resolved in (his) favor.”

Appellant believes that to hold the Army waiver as sufficient for civilian work would be to grant the Armed Forces and local boards the power to assign any convicted felon—be he murderer, habitual thief, pervert, etc.—to a civilian agency, if it be assumed that that agency has indicated that it has work openings available. The difference in the type and location of assignment and the degree of supervision, restraint, and discipline which the Armed Forces are able to impose, as compared to civilian agencies, is so apparent as to eliminate the need for further comment on this point. Judge Carter stated in his opinion in *Korte v. United States* that “the military agencies are entrusted with the task of selecting personnel

⁹ 136 F. Supp. 745 (E. D. Mich. 1954), at page 747.

¹⁰ 112 F. Supp. 618 (N. D. Cal. 1953), at page 624. See also *United States v. Graham*, 108 F. Supp. 794 (N. D. N. Y. 1952).

to defend the United States, and if they believe a registrant would not be suitable because of his prior felony conviction, they are not required to take him.”¹¹ Surely, if the Armed Forces have this choice, the Los Angeles County Department of Charities cannot be compelled to take a convicted felon into its employ just because the Secretary of the Army, fifteen months earlier, believed that on the record available to him the man might be a safe risk for induction.

“Waiver” is defined in Bouvier’s Law Dictionary as “the intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it.”¹² Neither the knowledge of the existence of this right in this particular case, nor the intention to relinquish it on the part of the Department of Charities appears in appellant’s Selective Service file. The lack of proof of such a waiver by the Department of Charities is not something which can be supplied by speculation or conjecture in a case involving the liberty of a defendant. Appellant’s motion for judgment of acquittal should properly have been granted under these circumstances.

C. Appellant’s I-A classification on August 21, 1956, did not eliminate the necessity for a waiver applicable to service in lieu of induction.

Counsel for the Government, in response to appellant’s motion for judgment of acquittal, repeatedly stated that, because this registrant was classified I-A following the waiver by the Secretary of the Army, “that commenced the whole thing anew”; “this defendant stood before the Selective Service Board . . . as a new registrant”; and “that started him off as if he had just come in and registered with that Board.” (TR 44) Appellant submits such statements are excellent illustrations of two logical fallacies—*non sequitur* and *petitio principii*, and indicate

¹¹ 260 F.2d 633 (9th Cir. 1958), at page 637.

¹² Third Revision, 1914, p. 3417.

a fundamental misconception as to several of the issues raised in appellant's motion.

The Court's attention is directed to the fact that the cases cited by the Government at the trial¹³ and by this Court in the *Korte* case,¹⁴ *supra*, are not applicable to this phase of appellant's argument. In none of these cases was the particular point at issue here even raised. In the *Korte* case particularly (repeatedly claimed by the Government to be identical with this action (TR 41-45)) the issue involved here was neither briefed nor argued, nor considered by this Court in its opinion. The only question considered was whether Section 6(m) of the Act should be construed to allow waivers of prior felony convictions at all. In short, the Government has cited no cases—and appellant knows of none—which have considered who must issue the waiver, and what its scope or contents must be in order to make a registrant liable for civilian work. To say, therefore, that, if a local board had the authority to classify a man I-A by virtue of a prior Army waiver of his conviction, it therefore had the authority to assign him arbitrarily to a civilian position after changing his classification to I-O, is illogical in fact and unsupported in law.

An equally serious gap in reasoning appears when it is claimed that simply because of a I-A classification the appellant reverted, in effect, to the status of a new eighteen-year-old registrant, without a prior felony record. To make this assertion is to beg the very question in issue—that is, the validity of an Army waiver as applied to civilian work.

It must be remembered that there is nothing magic about the I-A classification; nothing in the regulations endows this classification with the power to expunge fel-

¹³ *Korte v. United States*, 260 F.2d 633 (9th Cir. 1958); *United States v. Palmer*, 223 F.2d 893 (3rd Cir. 1955); *United States v. Goodrich*, 146 F.2d 265 (5th Cir. 1945).

¹⁴ *Doty v. United States*, 218 F.2d 93 (8th Cir. 1955); *United States v. Palmer*, 223 F.2d 893 (3rd Cir. 1955); *United States v. Bouziden*, 108 F.Supp. 395 (W.D. Okla. 1952).

only records from a Selective Service file. In this case, following his conviction, appellant had to be classified IV-F.¹⁵ If the waiver by the Secretary was allowable under the Act, it was a condition precedent to a I-A classification. Likewise, a waiver by the civilian employer in question would also be a condition precedent to a I-O classification.

In order to substantiate the Government's position, Section 6(m) of the Act¹⁶ regarding "training and service" would have to be limited to training and service following *induction* into the Armed Forces, as the Secretary of Army's waiver could not operate beyond this field. And unless a waiver concerning *induction* was the only necessary prerequisite, the contention that a I-A classification "commenced the whole thing anew" would be unsupportable. Actually, however, the "service" mentioned in this Section must also include civilian work in lieu of induction. The full text of Section 6(m) is as follows:

"No person shall be relieved from *training and service* under this title (section 451-454 and 455-471 of this Appendix) by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year."

Section 6(j) relating to conscientious objectors, expressly differentiates between combatant and non-combatant training and service, and civilian work as opposed to induction. Moreover, there are more than fifty separate and distinct instances in which the Act expressly limits "training and service" to active service in the Armed Forces. As a result of such differentiation between those on active service and conscientious objectors, the latter are given no disability and death compensation;¹⁷ they may be or-

¹⁵ Selective Service Regulations, Sections 1623.2, 1622.44 (32 C.F.R. § § 1623.2, 1622.44).

¹⁶ 50 U. S. C. A. App. § 456(m).

¹⁷ 50 U. S. C. A. App. § 454(e).

dered to report for civilian work before they attain nineteen years of age;¹⁸ they do not receive physical examinations at the end of their period of service;¹⁹ they have no reemployment right;²⁰ they are not guaranteed the right to vote in person or by absentee ballot, nor freed from the obligation of paying any poll tax;²¹ they are subject to the requirement of such service beyond the statutory termination date for those eligible for active service;²² and they have no rights similar to those contained in the Soldiers' and Sailors' Civil Relief Act.²³

That Congress intended the phrase "training and service," when not limited to the Armed Forces, to include all types of service under the Act, can also be illustrated by considering the sections other than 6(m) in which this phrase was not so modified. There are only a handful of such instances, concerning optometry and premedical students, and the like,²⁴ and the various sub-paragraphs of Section 6 relating to active duty personnel, foreign diplomatic representatives, the National Guard, Ready Reserve, Reserve Officers Training Corps, students, elected officials, judges, and ministers. The only other provisions of the Act in which "training and service" is not limited are those that are obviously general in scope; i. e., that all selections shall be made in an impartial manner, without discrimination;²⁵ that no exemption or deferment shall continue after the cause therefor ceases to exist;²⁶ that no one may act as a substitute for another, or avoid service by the payment of money;²⁷ and that the local

¹⁸ 50 U. S. C. A. App. § 455(a)(1).

¹⁹ 50 U. S. C. A. App. § 459(a).

²⁰ 50 U. S. C. A. App. § 459(b)-(h).

²¹ 50 U. S. C. A. App. § 459(i).

²² 50 U. S. C. A. App. § 467(c).

²³ 50 U. S. C. A. App. § 464.

²⁴ 50 U. S. C. A. App. § 454(i)(3).

²⁵ 50 U. S. C. A. App. § 455(a).

²⁶ 50 U. S. C. A. App. § 456(k).

²⁷ 50 U. S. C. A. App. § 458.

and appeal boards may consider questions concerning all exemptions and deferments.²⁸

If any doubt remained concerning the general scope of Section 6(m), the language of Section 4(i)(4) should alleviate it, for that section expressly provides that, for the purposes of that subsection only, "active service" includes service performed pursuant to Section 6(j) of the Act,²⁹ concerning work performed in lieu of induction. Therefore, as "training and service" in Section 6(m) is not limited, it must include civilian work, and a waiver by the applicable civilian employer was essential in this instance. As it was not obtained, appellant's I-O classification was arbitrary, and the order to report for civilian work void.

One final point should be mentioned. In substantiation of its position that the I-A classification started the classification process anew, counsel for the Government stated that no appeal was taken therefrom. (TR 44) This may be technically correct, but it is misleading. As stated above, appellant filed both a request for a personal appearance and an appeal from the I-A classification. (F 169, 170) The local board recognized that both a notice of appeal and such request had been made. (F 13) However, the local board properly disregarded the notice of appeal as premature; that opportunity for a personal appearance took precedence.³⁰ Upon the showing by appellant, the local board reclassified him I-O, and an appeal from that classification was immediately taken. Certainly appellant should not be deprived of any of his rights to a proper classification and a valid order to report merely because he demonstrated to the local board that the I-A classification was erroneous, rather than ignoring his right to a personal appearance and relying upon an immediate appeal. In view of this, if the appellant had been clas-

²⁸ 50 U. S. C. A. App. § 460(b)(4).

²⁹ 50 U. S. C. A. App. § 456(j).

³⁰ Selective Service Regulations, Sections 1624.1(a), 1624.2(e) (32 C. F. R. § § 1624.1(a), 1624.2(e)).

sified I-O immediately, would the Government then contend that the I-O classification “started everything anew”? There is no requirement that every person classified I-O be first placed in the I-A category; indeed, the regulations are to the contrary.³¹

III. The evidence produced at the trial was legally insufficient to support the judgment of guilty.

This point on appeal is based upon the discussion in paragraph II of this brief, *supra*. Concisely stated, as the evidence failed to disclose any proper waiver by the Los Angeles County Department of Charities, the action of the trial judge in finding the appellant guilty as charged is unsupported. If any such waiver exists, appellant has the right to know when it was made, by whom, and pursuant to what authority. Nor can there be any presumption of administrative regularity here, as the Selective Service file does not disclose that the assigned employer ever considered this question, and no regulations have been shown indicating that this would be done in the normal course of events. In this particular case, therefore, the motion for judgment of acquittal was improperly denied.

CONCLUSION

Even if it be assumed that Section 6(m) of the Act should be interpreted so as to permit waivers of prior felony convictions, unless the phrase “training and service” in that section applies only to service in the Armed Forces following induction—and it clearly is not so limited—the waiver by the Secretary of the Army cannot apply to civilian service in lieu of induction. Therefore, as the Selective Service file does not disclose a waiver by the Los Angeles County Department of Charities, the Appeal Board must have denied the required IV-F classification

³¹ Selective Service Regulations, Section 1622.14(a) (32 C.F.R. § 1622.14(a)).

without basis in fact, thereby making the I-O classification arbitrary and the order to report for civilian work void.

WHEREFORE, the appellant prays that the judgment of the District Court be reversed, and the cause remanded with directions to the trial court to enter a judgment of acquittal and discharge the appellant.

Respectfully submitted,

CLARK A. BARRETT

315 Montgomery Street
San Francisco 4, California

Counsel for Appellant

April, 1959.

requested. At such time as the Air Force accepts personnel through the Selective Service System an officer will be provided to act upon individual cases presented to the group.

FOR THE CHIEF OF STAFF:

/s/ Milton Fryer, Jr. Lt. Col USAF

for JOSEPH W. KELLOGG
Col. USAF
Executive
Directorate of Training

C O P Y



No. 16,275

IN THE

United States Court of Appeals

For the Ninth Circuit

DEAN EJNARD BJORSON,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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No. 16,275

IN THE

**United States Court of Appeals
For the Ninth Circuit**

DEAN EJNARD BJORSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Title 18 United States Code, Section 3231 and Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on June 6, 1956 for violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a) in that he knowingly refused to report to his Local Board to be given instructions to proceed to a place of employment for the purpose of doing civilian work contrib-

uting to the maintenance of the national health, safety and interest (Tr. 3-4). He pleaded not guilty, waived jury trial (Tr. 7-8) and was tried by the Honorable Michael J. Roche on August 7, 1958 (Tr. 8-9). Appellant was adjudged guilty (Tr. 9) and on October 15, 1958 was sentenced to a term of one year (Tr. 9-10). Appeal was timely made to this Court from the judgment of conviction (Tr. 11-12).

STATEMENT OF FACTS.

Appellant first registered with Selective Service on May 2, 1950 and gave his date of birth as May 2, 1932 (File 1 and 2). Appellant's Classification Questionnaire was filed with his Local Board on May 12, 1951 (File 5). On page 3 of the Questionnaire, appellant claimed to be a minister of religion in the Jehovah's Witnesses. He further claimed on page 7 that he was conscientiously opposed to participation in war in any form.

On May 28, 1951, appellant was classified 1-A by the Local Board (File 12). The classification of 1-A was appealed (File 27) and appellant's case referred to the Department of Justice for an inquiry and hearing with respect to his conscientious objector claim (File 40-41). The Appeal Board classified appellant 1-A on July 23, 1952 (File 42).

A medical Certificate of Acceptability forwarded to the Local Board, and dated August 15, 1952, indicated that the appellant was found not acceptable for in-

duction as he was sub-standard physically (File 44). Following a personal appearance before the Local Board on September 9, 1952, appellant was classified 4-F (File 48).

The Local Board then received a second medical Certificate of Acceptability dated July 6, 1953, indicating that appellant was found fully acceptable for induction into the armed forces (File 75). On July 14, 1953, appellant was classified 1-A (File 12). On August 3, 1953, the Local Board issued to appellant an Order to Report for Induction, directing that he report to his Local Board on August 14, 1953 for forwarding to an induction station (File 80). A letter addressed to the United States Attorney, dated August 14, 1953, from the induction station, indicated that appellant refused to submit to induction (File 82). Appellant was indicted for refusal to submit to induction, pleaded not guilty and proceeded to trial before the late United States District Judge Edward P. Murphy. Appellant was convicted and on February 19, 1954, was ordered to pay a fine of \$2,000.00 and received a two-year suspended sentence (File 99). The Local Board thereafter classified appellant 4-F on April 13, 1954. A letter addressed to the Local Board, dated April 15, 1954, from the United States Attorney, stated that appellant on March 9, 1954, was sentenced to imprisonment for two years on the basis of his refusal to pay the \$2,000.00 fine imposed by Judge Murphy (File 103).

On May 24, 1956, the Local Board received a Dependency Questionnaire from appellant indicating

that he had been employed at the American Supply Company, Berkeley, California since July 28, 1955, and was earning \$80.00 a week (File 107).

A Request for Determination of Eligibility for Induction was forwarded to the Commanding General of the Sixth Army on June 27, 1956 (File 138). The request indicated that appellant had been confined in the Federal Prison Camp at Tucson, Arizona for a period of fourteen months, and had been placed on parole which terminated April 7, 1956 (File 140). The Commanding General, Sixth Army, Presidio, San Francisco, California recommended to the Adjutant General, Department of the Army, Washington, D.C., approval of the request on June 28, 1956 (File 141), and on July 12, 1956, the Joint Induction Screening Group, Department of the Army, Washington, D.C., approved the aforesaid request for a moral waiver. The Secretary of the Army on July 13, 1956, approved the request for waiver of appellant's prior conviction in a memorandum addressed to the Commanding General, Sixth Army (File 134), and on July 20, 1956, a medical Certificate of Acceptability was issued indicating that appellant was fully acceptable for induction into the armed forces (File 167).

Thereafter on August 21, 1956, appellant was classified 1-A by his Local Board (File 13). It is noted that appellant took no appeal from this classification.

On September 10, 1956, the Local Board received a report from appellant's employer stating that appellant worked an average of 40 hours a week for the American Supply Company, Berkeley, California

(File 171). An Occupational Questionnaire dated September 11, 1956, and received by the Local Board, indicated that appellant according to his own statement at that time, was working 40 hours a week for the American Supply Company of Berkeley, California (File 191).

On September 11, 1956, appellant was classified 1-O by his Local Board (File 13), and on September 21, 1956, appellant appealed the classification claiming to be a minister of religion (File 198). Appellant's case was for the second time referred to the Department of Justice for inquiry and hearing respecting the character and good faith of his conscientious objector claim. On March 22, 1957, T. Oscar Smith, Chief, Conscientious Objector Section, Department of Justice, recommended in a letter addressed to the Appeal Board, that appellant be classified 1-O (File 206). On July 18, 1957, the Appeal Board classified appellant 1-O (File 212).

Appellant in a letter addressed to the Local Board on August 25, 1957, stated that if he were to accept work prescribed by Selective Service, he would be serving two masters, and, therefore, could not select any types of work offered (File 220).

The file of appellant contains a report of an interview with appellant on September 16, 1957, at the Local Board, at which time appellant stated he could not accept any job offered by Selective Service in lieu of induction, although he did admit he was not a pioneer minister and worked 40 hours a week in secular employment (File 227-228).

On October 9, 1957, appellant was ordered to report for civilian work and directed to report to his Local Board on October 21, 1957, to be given instructions to proceed to the Los Angeles County Department of Charities, Los Angeles, California (File 237). The file contains a memorandum dated October 22, 1957, stating that appellant did not report to the Local Board as ordered on October 21, 1957, to receive instructions to proceed to the place of employment (File 247).

It was stipulated at the trial that a certified photo-static copy of the Selective Service file of appellant be marked and introduced as Government Exhibit 1 in evidence in place of the original and without calling the Clerk to identify the file (Tr. 18). It was further stipulated that appellant failed to report to his Local Board as directed to receive instructions to proceed to a place for employment (Tr. 18). Appellant offered no evidence nor did he testify in his own defense.

QUESTION INVOLVED.

1. Is a waiver of moral unfitness by other than the armed forces a prerequisite to a registrant's being assigned work of national importance?

ARGUMENT.

I. APPELLANT HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDY.

Appellant cannot raise any infirmity in his classification since he has failed to exhaust his administrative

remedy. *Falbo v. United States*, 320 U.S. 549 (1944). According to this case the registrant must go to the "brink" of induction before he can raise any infirmity in his classification. In the case of a registrant ordered to perform civilian work the court's opinion in *United States v. Sutter*, 127 F. Supp. 109, 117 (S.D. Cal.) is apposite. As the court stated:

"Reporting to the local board preparatory to departing for the performance of the work ordered, is the 'brink', *Estep v. United States*, supra, *Williams v. United States*, supra, to which the registrant in Class 1-O must come before he may obtain a judicial review of his classification."

In this case, the appellant was directed to report to his Local Board on October 21, 1957 to be given instructions to proceed to the Los Angeles County Department of Charities, Los Angeles, California. Appellant did not appear at the Local Board as ordered to receive his instructions and, therefore, is in the same position as a registrant who does not appear at the Induction Station. As the Supreme Court stated in *Falbo v. United States*, supra,

"If he has been classified a conscientious objector opposed to noncombatant military service, as was petitioner, he ultimately is ordered by the local board to report for work of national importance. In each case the registrant is under the same obligation to obey the order. But in neither case is the order to report the equivalent of acceptance for service. Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may

still be rejected at the induction center and the conscientious objector who is opposed to non-combatant duty may be rejected at the civilian public service camp." (Page 553.)

This is especially so here, where defendant is arguing that there was no proper waiver of his unfitness and that he should have been rejected by the Los Angeles County Director of Charities.

II. APPELLANT CANNOT RAISE THE BASIS FOR DENIAL OF HIS 4-F CLASSIFICATION.

(1) Appellant Failed to Appeal From His 1-A Classification.

Any defect in the refusal of the Selective Service System to classify the appellant 4-F is waived because appellant failed to appeal from this refusal. As the record shows, appellant's proper classification on his release from imprisonment was 4-F. On August 21, 1956, however, appellant was classified 1-A by his Local Board. If there was any error in stripping appellant of his 4-F classification, it occurred when he was classified 1-A and was waived by his failure to appeal. In addition, appellant further made clear this waiver by appealing his 1-O classification on the sole ground that he was a minister of religion. The orderly administration of the Selective Service laws prevents a registrant from bringing any defect in his classification to the notice of the court trying him where no hint of such an infirmity was presented to the Local Boards. Possibly the Local Board, for reasons of its own, would have classified the appellant as

morally unfit. In view of his failure to present this issue within the Selective Service System, he cannot now raise it.

(2) The 4-F Classification on Conviction of a Felony Is Not Created for the Benefit of the Felon.

The whole strain of appellant's argument that he was wrongly ordered to appear for service is a classic example of a man seeking to profit by his own wrong. Appellant would interpret Section 6(m) of the Universal Military Training and Service Act, 50 U.S.C.A. App., Section 456(m), as providing a Congressional benefit to those who have been convicted of felonies. Regardless of the merits of appellant's position on other facets of this matter, it would seem that whatever the intent of Congress in passing that section, it was not a feeling of generosity toward felons. Accordingly, it would seem that the registrant is not in the class of those to be benefited by the statute and, accordingly, cannot raise it. It would be an anomaly, indeed, if a section passed for the purpose of allowing the armed forces to free themselves of undesirables were to be interpreted to allow registrants to escape such service under the claim that they were undesirable.

This was also the holding in the case of *Korte v. United States, infra*, where the court held that:

"We conclude that Section 6(m) of the Act, [50 U.S.C.A. Appendix, Section 456(m)] is not a direction on the part of Congress to exempt from training and service those persons convicted of felonies, but on the contrary is an injunction

not to defer from training and service those persons who have been convicted of misdemeanors. Where there has been a conviction of a felony, the exemption is permissible but is not required. The IV-F classification permissible for a registrant is not created for his benefit, it is created for the benefit of the armed forces.”

III. NO FURTHER WAIVER OF A FELONY CONVICTION IS REQUIRED HERE.

Despite the subdivisions of his argument, appellant advances one real ground for this appeal. That is, that a waiver of a prior felony conviction by the Los Angeles County Director of Charities is necessary here. Appellant contends that the army regulation 10D-1, which applies to the armed forces, must have its counterpart in a civilian charity where a conscientious objector is assigned for civilian work. Much the most important obstacle in appellant's way is the case of *Korte v. United States*, 260 F. 2d 633. The opinion in that case states that:

“This appeal presents the sole question as to whether a Selective Service registrant who has been previously convicted of a felony, is entitled to a classification in IV-F and exemption from service.”

Appellant would have us read this opinion as if it applied to a case where a man was inducted into the Army after a waiver of a 4-F classification. Then he constructs the ingenious argument that where no military service is involved there must be a waiver from

the civilian agency. This argument seems to ignore the fact that *Korte v. United States* involves exactly the same factual situation as here. *Korte*, like the appellant here, was prosecuted, not for failure to submit for induction, but for failure to report for work with the Los Angeles County Department of Charities. The whole reasoning of the court in *Korte* is equally applicable to the instant case. Appellant's argument that the Secretary of the Army is incapable of signing a waiver for all the armed forces is equally applicable to the *Korte* case. Lest it be concluded that this point was completely ignored by the court in *Korte*, we submit that the following quotation is apposite:

"The military agencies are entrusted with the task of selecting personnel to defend the United States, and if they believe a registrant would not be suitable because of his prior felony conviction, they are not required to take him. They may, however, waive the disability and in such instance he may be inducted into the armed forces *or assigned to work of national importance*." (Emphasis supplied.)

Indeed, appellant's whole reconstruction of the statutory scheme for the deferment of conscientious objectors is faulty. Title 50, U.S.C.A. App., Section 456(j) makes it clear that "in lieu of such induction [the registrant may be ordered] by his Local Board . . . to perform for a period equal [to the period of service] . . . such civilian work contributing to the maintenance of the national health . . . as the Local Board may deem appropriate." It is clear that under this statutory scheme any conscientious objector who

otherwise could be inducted into the armed forces, would be assigned to work of national importance. By requiring an additional waiver from the Los Angeles County Director of Charities, the appellant would have this Court hold that a registrant classified 1-O might otherwise be acceptable for induction into the Army and yet, because of the absence of a waiver from the civilian agency, might escape all service of any kind. Such obviously was not the intent of Congress and to allow such a defense here would be to fly in the face, not only of the *Korte* decision, but of the whole framework provided for the treatment of conscientious objectors.

The judgment of the District Court, therefore, should be affirmed.

Dated, San Francisco, California,
June 15, 1959.

LYNN J. GILLARD,
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DONALD B. CONSTINE,
Assistant United States Attorney,

JOHN KAPLAN,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

STATUTE.

Section 6(j), Universal Military Training and Service Act, 50 U.S.C. App. 456(j) provides:

Conscientious objectors. Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey

any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) he shall be assigned to non-combatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to

perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

STATUTE AND REGULATIONS.

Section 6(m) of The Universal Military Training and Service Act of 1948, as amended (50 App. 456m). Moral Standards.

“No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year.”

Selective Service Regulation 1622.44 Class IV-F: Physically, Mentally, or Morally Unfit.

“In Class IV-F shall be placed any registrant (a) who is found to be physically or mentally unfit for any service in the armed forces; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally un-

acceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation."

Selective Service Regulation 1628.10. Who Will Be Examined.

"Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 3. Functions of Induction Stations.

"The primary functions of induction stations are to—

a. Determine by examination which registrants meet the physical, mental, and moral standards for service in the Armed Forces."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10d. Moral Standards (except as provided in par. 27e).

“Information concerning court convictions of a registrant and whether he is in custody of the law will be indicated on DD Form 47, under item 14a and b. More specific information concerning such an entry, especially with respect to personal background, the circumstances of the incident or incidents, and final disposition of charges will be obtained from the registrant at the induction station during the preinduction interview. If a waiver is granted under (1) or (2) below, a copy of the report of investigation on which waiver is predicated will be attached to the original copy of the induction record (DD Form 47).”

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10d(1).

“A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department . . .”

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10e. Individuals ineligible for induction.

“Individuals listed below are ineligible for induction.”

Administrative Disqualifications

(1)(c) "Registrants who fail to meet the prescribed moral standards indicated in d. above."

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 14. Preparation and processing of records.

" . . .

b. DD Form 47. (1) Purpose.—DD Form 47 is the official form for recording the results of the administrative records examination during the registrant's preinduction and induction processing. It is a basic personnel document in the files of the Armed Forces and Selective Service System."

No. 16,277

IN THE

**United States Court of Appeals
For the Ninth Circuit**

EDWARD BUTLER and DONALD CAHÉE,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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No. 16,277

IN THE

**United States Court of Appeals
For the Ninth Circuit**

EDWARD BUTLER and DONALD CAHEE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Appellants were charged in a three-count indictment returned May 29, 1958 by the Grand Jury of the Northern District of California. The first count charged appellant Edward Butler with transferring marijuana without a written order in violation of Title 26 U.S.C. Section 4742. The second count charged Edward Butler with concealment of marijuana in violation of Title 21 U.S.C. Section 176 (a). The third count charged appellant Donald Cahee with concealment of marijuana in violation of Title 26 U.S.C. Section 4744. Motions for Suppression of Evidence and for a Severance were made on June 12, 1958 by the appellant Edward Butler and on June 16,

1958 appellant Donald Cahee also moved to suppress evidence. A hearing was held before the Honorable George B. Harris, United States District Judge, wherein all motions of the appellants were denied. Appellants waived jury trial and were tried before the Honorable Michael J. Roche. On October 14, 1958 appellant Edward Butler was convicted on Count II, and appellant Donald Cahee was convicted on Count III. Since both appellants were second offenders, Edward Butler was sentenced to ten years' imprisonment and Donald Cahee was sentenced to five years' imprisonment.

On October 23, 1958, appellants filed timely notice of appeal. On November 19, 1958, an order was entered by United States Circuit Judge Albert Lee Stephens permitting the appeal *in forma pauperis*.

Jurisdiction of this court over the appeal is conferred by Title 28 U.S.C. Section 1291.

STATEMENT OF THE CASE.

On May 27, 1958 Ira Feldman, a Federal Narcotics Agent, learned from an informer that appellant Edward Butler was dealing in marijuana and that this informer, one William James, had seen some marijuana in Edward Butler's apartment at about 6:30 that evening. At 9:00 P.M., a group of narcotic agents led by Agent Feldman knocked at the door and when Edward Butler opened it, placed him under arrest. Appellant Donald Cahee was sitting in the apartment when the agents entered. Agent Ira Feldman

asked him if he was "clean". Donald Cahee replied that he was not, that he had marijuana in his possession which he had just bought from appellant Edward Butler. Incident to the arrest of Edward Butler in the apartment, the agents searched the apartment and discovered on a kitchen table, a quantity of marijuana. William James, the informer, was not produced as a witness by the government, nor was he produced by the defense.

QUESTIONS PRESENTED.

1. Was the evidence on Count II sufficient to convict?
 2. Was there an illegal search and seizure?
-

ARGUMENT.

I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT EDWARD BUTLER.

Appellant Edward Butler argues that, first, the case of *Caudillo v. United States*, 253 F. 2d 513, directly on this point, is distinguishable because the marijuana involved there was unmanicured (that is, with stems and leaves present) whereas here the record fails to show that. Second, in any event, that *Caudillo v. United States*, decided by this circuit, is wrong.

As to the first point, the appellant is in error because the marijuana at issue here was also unmani-

cured as is shown by Exhibits I, II, III, V, and VII, which are as much a part of the record as the typewritten statements in court. The judge examined these exhibits before rendering his verdict and he could see, as can this court, that the marijuana was unmanicured. Appellant then is forced to rely on the chance of this court's overruling the *Caudillo* decision.

We believe it would be presumptuous of the government to argue that a case decided so recently after such full consideration is correct. In any event, no court has disagreed with the opinion and it is a law in this circuit. Should any argument be necessary on merits of the *Caudillo* case, we believe that the well-reasoned opinion by Judge Barnes in that case states the law far better than the government could in its brief, and we, therefore, incorporate that by reference.

It furthermore appears that this issue was never raised before the trial court. Had it been, it is possible that the court might have made more detailed findings or that the government would have produced more evidence. For this reason it would appear that this court is without jurisdiction to decide this issue.

II. THERE WAS NO ILLEGAL SEARCH AND SEIZURE.

Appellant's second point is that the search and seizure was illegal and, therefore, that evidence was wrongly admitted at the trial. In order for the court to uphold this argument, it would have been to rule

that a recent Supreme Court decision, *Draper v. United States* (1959) 79 S. Ct. 329, is wrong. The appellant argues that this case is distinguishable from *Draper v. United States* because in *Draper*, the informant was shown to be dead, whereas in this case, the informant was merely unavailable and not produced by either the government or the defense.

Nowhere, however, is the distinction hinted at in the *Draper* opinion and, indeed, the opinion appears to imply that, even if the informant were available, it would not be necessary to use him. In *Draper* the court merely held that hearsay information could be sufficient to constitute probable cause, and more particularly, "reasonable grounds" within the meaning of Section 104 (a) of the Narcotic Control Act of 1956.

Here there is no contention that the amount of information received by Agent Feldman was insufficient, but merely that it was hearsay. It should be noted that the question of whether the hearsay was sufficient to constitute "reasonable grounds" is entirely independent of the question of whether the information presented to the agent was, in fact, correct. The agent, himself, testified to the circumstances surrounding his receipt of information and any evidence on that fact given by the informant would be merely cumulative. On the other hand, although the foundation for this hearsay could be testified to by the informant, it is irrelevant to the question of "reasonable grounds". Accordingly, since the appellant has not complained that the actual information received from the informant was insufficient to constitute

probable cause, his only defense on this point can be the non-prejudicial failure to produce the informant. Therefore, this point is not well taken.

Accordingly, the judgment should be affirmed.

Dated, San Francisco, California,

July 21, 1957.

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Attorneys for Appellee

No. 16,279 ✓

**United States Court of Appeals
For the Ninth Circuit**

LILLIAN HISAKO SATO and BLANCHE
MASAKO SATO,

Appellants,

VS.

JOHN FOSTER DULLES, Secretary of
State of the United States,

Appellee.

**Appeal from the United States District Court
for the District of Hawaii.**

BRIEF FOR APPELLANTS.

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United States Court of Appeals For the Ninth Circuit

LILLIAN HISAKO SATO and BLANCHE
MASAKO SATO,

Appellants,

vs.

JOHN FOSTER DULLES, Secretary of
State of the United States,

Appellee.

Appeal from the United States District Court
for the District of Hawaii.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

Plaintiff, Lillian Hisako Sato, a citizen of the United States by birth, (Tr. p. 3) voted involuntarily in a Japanese political election on April 10, 1946, (Tr. p. 5) and under the provisions of the Nationality Act of 1940 (Sec. 401(e)) then in force, she lost her United States citizenship. This plaintiff applied to a United States Consular Officer in Fukuoka, Japan on November 22, 1956, for registration as an American citizen and for a passport to Honolulu, Territory of Hawaii. On April 30, 1956, said consular officer in

response to said application issued to this plaintiff a certificate of loss of citizenship, bearing State Department approval under Section 501, of said Nationality Act of 1940 (Tr. pp. 4, 5). The District Court of the United States for the District of Hawaii, within whose jurisdiction this plaintiff claimed permanent residence, (Tr. p. 3) had jurisdiction under Section 503, of said Act to hear this plaintiff's application for a judgment declaring her to be a citizen of the United States.

This plaintiff's right to contest her loss of citizenship conferred on her by said Nationality Act of 1940, was preserved by the Savings Clause of the Nationality Act of 1952 (Sec. 405, 8 USC Sec. 1101, note) which is summarized post, p. 18.

This plaintiff's right to contest her loss of citizenship conferred on her by said Nationality Act of 1940, and said procedure therein provided for the exercise of said right survived the repeal of said Act by said Nationality Act of 1952, because the corresponding right and remedy provided by the latter Act (Section 360(b), 8 USC 1503 (b and c) is nugatory and further, because Section 349(5) of the latter Act, USC Sec. 1481(5) is invalid and Section 360 (b and c) of the latter Act, 8 USC 1503 (b and c) is consequently surplusage. Section 360 (b and c) of the 1952 Act (8 USC Sec. 1503 (b and c)) is summarized post at pages 12-13.

Plaintiff, Blanche Masako Sato, a citizen of the United States by birth, (Tr. p. 3) voted in Japanese

political elections on April 23, April 30 and July 20, 1951, and on October 5, 1952 and December 20, 1954 (Tr. p. 5). She applied to a United States Consular Officer on March 7, 1956 for registration as a citizen of the United States and for a passport to Honolulu, Territory of Hawaii (Tr. p. 4). On August 1, 1956, said consular officer in response to said application issued to this plaintiff a certificate of loss of citizenship, bearing State Department approval, under Section 401(e) of the Nationality Act of 1940 (Tr. p. 5). Sec. 503 of this same Act confers jurisdiction on the District Court of the United States for Hawaii to hear this plaintiff's application for a judgment declaring her to be a citizen of the United States, this citizen claiming permanent residence within the jurisdiction of said court (Tr. p. 3). This plaintiff is entitled to said remedy in said court despite the substitute provisions of the Nationality Act of 1952, for reasons above stated.

This is an appeal from an order of the District Court of the United States for Hawaii sustaining a motion to dismiss plaintiffs' complaint for lack of jurisdiction and dismissing said complaint (Tr. p. 19). The United States Court of Appeals for the Ninth Circuit has jurisdiction of the appeal (28 USC Sec. 1294(1)).

QUESTIONS INVOLVED.

This appeal involves the question of the validity of the voting provision of the Nationality Act of 1952

(8 USC Sec. 1481(5)), of the procedural provision of said Act (8 USC 1503 (b and c)) and of the survival of the procedural provision of the Nationality Act of 1940, if said provisions of the 1952 Act are held to be invalid. The appeal also involves the question of the effect of the Savings Clause of the Nationality Act of 1952 (8 USC Sec. 1101 note) in preserving Sec. 503, of the Nationality Act of 1940.

SPECIFICATIONS OF ERRORS.

I.

The trial judge erred in sustaining defendant's motion to dismiss the Amended Complaint and in dismissing the Amended Complaint.

II.

The trial judge erred in holding that Sec. 360 (b and c) of the Nationality Act of 1952 (8 USC Sec. 1503 (b and c)) was a valid substitute for Sec. 503, of the Nationality Act of 1940 and that said Sec. 503 was repealed to make room for the invalid provisions of Sec. 360 (b and c) of said Nationality Act of 1952 (8 USC Sec. 1503 (b and c)).

III.

The trial judge erred in failing to hold that 8 USC Sec. 1481(5) was invalid and that 8 USC Sec. 1503 (b and c) was surplusage, as related to said Sec. 1481(5).

IV.

The trial judge erred in failing to hold that 8 USC Sec. 1481(5) and 8 USC Sec. 1503 (b and c) taken together were invalid, the former section being unenforceable through the ineffective and invalid procedure of the latter section.

V.

The trial judge erred in holding that 8 USC Sec. 1503 (b and c) was a valid enactment.

VI.

The trial judge erred in failing to hold that Sec. 503, of the Nationality Act of 1940, provided the procedure for plaintiffs-appellants and conferred jurisdiction on the court below.

VII.

The trial judge erred in failing to hold that the Savings Clause of the 1952 Nationality Act preserved Sec. 503 of the Nationality Act of 1940.

ARGUMENT.

I.

SECTION 1481 (5) OF THE NATIONALITY ACT OF 1952, FORFEITING UNITED STATES CITIZENSHIP IN CONSEQUENCE OF THE CITIZEN'S VOTING IN A FOREIGN ELECTION DOES NOT APPLY TO PLAINTIFFS WHO WERE CITIZENS OF JAPAN AND THE UNITED STATES WHEN THEY VOTED IN JAPAN.

The Court in *Kawakita v. U. S.*, 343 U.S. 717, states the case for dual citizenship. It refers with approval

to a State Department ruling that a person with dual citizenship who lives abroad in the other country claiming him as a National, owes an allegiance to it which is paramount to the allegiance he owes to the United States. The Court says at page 435:

“Of course, an American citizen who is also a Japanese National living in Japan has obligations to Japan necessitated by his residence there. There might conceivably be cases where the mere non-performance of the Acts complained of would be a breach of Japanese law.”

A Japanese National, who is also a National of another country has the right and duty to vote in Japanese political elections under Japanese law.

In the *Kawakita* case, *supra*, it took treason to the U.S. to put a limit to our recognition of the duties which a dual citizen owed his other country and to our allowance of the performance thereof. The defendant had taken the position that as a dual citizen of Japan and the U.S. residing in Japan he could not be guilty of treason to the U.S., which may be theoretically sound. As a Japanese National it was his patriotic duty to adhere to and to fight for Japan and against her antagonist, the U.S. But this is the definition of treason in our Statutes. Only a citizen may be guilty of treason but because of the gravity of the offense, the Japanese National, who was also a National of the United States, was nevertheless held to be guilty of the offense. See “The Legal Effects of Dual Nationality”, 17 Geo. Wash. L. Review 427, 429, cited in the *Kawakita* case, *supra*, at p. 433. There

is not this compelling reason to visit the prescribed penalty of forfeiture of American citizenship upon the citizen of Japan, who exercises his right of franchise in Japan.

The law of dual nationality is the law of the land. It must be assumed that when Congress enacted the 1940 and 1952 Nationality Acts, it had in mind the right and duty of our dual citizens to vote in elections in their other countries and our recognition of their right and duty so to do. It must be further assumed that in depriving citizens of their citizenship as result of their voting in foreign elections, Congress was exercising the sovereign power of fostering amicable relations with foreign powers and preventing friction therein, as held in *Perez v. Brownell*, 356 U.S. 44, 2 L.ed. 2d 603, in defense of the authority of Congress to denationalize citizens. But it would be a repudiation of the law of dual nationality and a slap in the face of a foreign country to frustrate its elections and to penalize its voters by taking away the American citizenship of those who were citizens of both countries. Congress could not have intended the affront. Congress could not have intended to deprive a Japanese National who was also a National of the United States of the right to representation in the matter of taxation, taxation without representation being a political anathema in the United States. When Congress provided that Nationals whether by birth or naturalization would lose their citizenship Congress meant only to include both kinds of citizens but not necessarily dual citizens. The section would have

meant the same thing if "whether by birth or naturalization" had been omitted. As stated in 50 Am. Jur. Statutes Sec. 346:

"Indeed, . . . in cases where a contrary intent is not manifest, clear, obvious, or inescapable, or explicitly and unmistakably indicated by direct, peremptory and unambiguous language, it is presumed that no change in the common law was intended, and the statute is generally interpreted as affecting no such change."

Therefore, neither the voting provision of the 1940 Nationality Act (Sec. 401(e)) nor the same provision of the 1942 Nationality Act applies to plaintiffs. Their right of redress is under Sec. 503 of the 1940 Act for reasons hereinafter stated.

II.

THE VOTING PROVISION OF THE 1952 ACT (SEC. 349 (5), 8 USC SEC. 1481 (5)) AND THE REMEDY PROVIDED BY THE ACT (8 USC 1503 (b AND c)) ARE INVALID; THE REMEDY PROVIDED BY THE 1940 ACT (SEC. 503) CONTINUES IN EFFECT DESPITE THE PURPORTED REPEAL BY THE 1952 ACT.

Sec. 349(5) of the Nationality Act of 1952 (8 USC 1481(5)) provides that a National of the United States shall lose his nationality by voting in a political election in a foreign state. When does the loss of nationality occur? It would seem preposterous to construe the section to mean the opposite of what it says, that is, that the National shall not lose his nationality by so voting, at least until such time as he may avail himself unsuccessfully of the remedies pro-

vided in the 1952 Act (8 USC Sec. 1503). And yet this would seem to be the only possible construction of the Sections. Otherwise the sections would operate automatically and without a hearing, administrative, judicial or otherwise, which would be clearly had. Compare necessity for hearing in forfeiture cases. 25 C.J. Fines, Forfeitures and Penalties Sec. 53. The government could not in such an arbitrary manner relieve itself of its duty to protect citizens. Since the Sections provide no means for their execution or enforcement or for carrying their provisions into effect, standing alone, they would be invalid and void. 59 C.J. Statutes Sec. 176, p. 618.

An adequate remedy for the citizen victim is indispensable to the validity of the Section under consideration. Since both the government and the citizen are interested parties, in that the government may be relieved of its duty to protect the citizen and the citizen may lose his corresponding right as well as all his other rights of citizenship, both the government and the citizen would seem to be entitled to a remedy. But the government has none; it cannot initiate action under 8 USC Sec. 1503(b) to enforce or declare the loss of citizenship, which would seem of itself to be fatal to the Section under consideration. A consular officer may or may not know of the citizens voting, he may or may not recommend issuance of a certificate of loss of nationality under 8 USC Sec. 1501. In any case the issuance of such certificate and its approval by the Secretary of State are *ex parte* proceedings and ineffective for the same reason that the

provision for loss of nationality as a result of voting in foreign elections is ineffective as a self-executing provision. The issuance of a certificate of loss of nationality does not set in motion the procedure provided by said Sec. 1503; it is not the equivalent of the assertion by the erstwhile National of a right as a National as required by Sec. 1503(b).

On the other hand the citizen has a right to apply for admission to his country when and if he claims a right as a National and is denied such right by any department, independent agency or official of the United States. The right which the citizen must claim is a right which the department or independent agency or official is capable of granting, which is a narrow limitation. The citizen might claim and exercise all his constitutional rights as a citizen with exceptions noted, without bringing into play the remedy of the 1952 Act, and thereby jeopardizing his citizenship. The only right as a citizen which is withheld from him in consequence of his voting in a foreign political election is the right to come home. This right he may attempt to exercise only on pain of or at the risk of being denationalized. For reasons of health or finances the citizen may be compelled to forego returning to his country; in which case he would remain a citizen in full possession of all his rights as such, with the exception noted, though hampered, perhaps, in the exercise of some by his residence abroad. The section under consideration even aided by its remedy is futile, unenforceable and invalid.

Consistently with appellants' contention that 8 USC Sections 1481(5), the voting provision, and 1501, the certificate of loss of citizenship provision and Sec. 1503 (b and c), the remedy—all being provisions of the 1952 Act—are invalid, the government issued to appellant, Blanche Masako Sato, a certificate of loss of citizenship under the provisions of the 1940 Act (Tr. p. 5), although she voted in 1954, (Tr. p. 5) after the effective date of the 1952 Act, as if to accord and to concede to her the procedural rights of the former Act.

Since the voting Section of the 1952 Act. (8 USC Sec. 1481(5)) and the remedial Section of the Act 1503 (b and c) are invalid, the repealing provisions of the Act fail in so far as they relate to the voting Sec. 401(e) and the remedial Section 503 of the 1940 Act, which sections, therefore, continue in force, unaffected by said repealing provisions of the 1952 Act, and irrespective of the Savings Clause in said 1952 Act. 50 Am. Jur. Statute Sec. 523, citing *American Federation of Labor v. Rain*, 106 Or.' 183, 106 P. 2d 544. It would seem to go without saying, *ex necessitate*, that a remedy provided in a repealed statute would survive the repeal, if the substituted remedy in the repealing statute were invalid. See *Application of Emmet O'Sullivan*, 161 ALR 487, 158 P. 2d 306; *Muzurek v. Insurance Co. of Jamestown*, 102 ALR 798, 181 A. 570.

The voting provision of the Nationality Act of 1940 (Sec. 401(e)) is invalid for the same reason that the corresponding section of the Nationality Act of 1952

(Sec. 1481(5)) is invalid. Procedure is provided under the former Act (Sec. 503) for the adjudication of the invalidity of said voting section. This procedure survives the repeal of the 1940 Act by the 1952 Act, because the substitute remedy provided in the 1952 Act is invalid for reasons above indicated and for further reasons given post at pp. 12-17.

III.

8 USC SEC. 1503 (b AND c) IS INVALID.

Under the provisions of 8 USC Sec. 1501 a consular officer, who may have reason to believe that a citizen has lost his citizenship under 8 USC Sec. 1481, is required to give his reasons for his belief to the Secretary of State for the latter's approval (8 USC Sec. 1501). No provision is made in case of disapproval by the Secretary of State. When the former citizen is denied a specific right belonging to citizenship, he may apply to the same consular officer, who recommended the issuance of a certificate of loss of citizenship in the first place, for a certificate of identity to come to the U.S. to apply for admission as an alien. The certificate of identity may be denied on the ground that applicant has lost his citizenship. If the application for a certificate of identity is denied, the Secretary of State, who had previously approved the issuance of the certificate of loss of citizenship after reviewing the facts in the matter, as presented to him by the consular officer, adjudges the application for the certificate of identity by way of appeal

from the denial of the certificate by the consular officer (8 USC Sec. 1503). If the Secretary of State approves the denial of the certificate, that is the end of the matter; and the erstwhile citizen remains stranded in a foreign land, deprived even of the benefit of the provisions of the Act relating to proceedings involving aliens seeking admission. If the erstwhile citizen succeeds in obtaining leave to come to the U.S. to apply for admission as an alien, his application is governed by said provisions of the Act relating to aliens, seeking admission, under which a special inquiry officer determines what evidence is to be received and the Attorney General on appeal considers only such evidence. The decision of the Attorney General is final (8 USC Sec. 1226). But under 8 USC Sec. 1503, the decision of the Attorney General may be reviewed in habeas corpus proceedings, the scope of which is narrowly circumscribed, and the right to which would have existed without the provision for it in the Act. In *Japanese Immigration Case*, 189 U.S. 86, 47 L.ed. 721.

In *Keilkila v. Barber*, 78 S.Ct. 603, 607, the court remarks that it expressed no opinion on the question whether habeas corpus is regarded as judicial review (note 12). Nor it is clear under the Act whether the review by habeas corpus provided by the Act is the conventional review in immigration cases or the review provided by the Administrative Procedure Act. 5 USCA 1009. The Act of September 27, 1950, 81st Cong., 2nd Sess., 64 Stat. 1048, provides: Proceedings under the law relating to the exclusion . . . of aliens

shall be without regard to the provisions of Sections 5, 7 and 8, of the Administrative Procedure Act (5 USC 1004, 1005, 1007). Section 1009 would seem to be left to apply to the exclusion of aliens.

In any case, if the erstwhile citizen gets over all these hurdles and he is at long last allowed to enter his former country, it is still unclear whether the right of entry accorded him embraces full rights of citizenship. If the procedure provided by 8 USC Sec. 1503 (b and c) constitutes due process, it is only because there is no limit to the extent to which administrative measures may delay, hinder, embarrass, complicate and frustrate the right and remedy of a citizen, converted by Congress into an alien, to challenge the metamorphosis or to re-establish his citizenship.

In *Perez v. Brownell*, 356 U.S. 44, 2 L.ed. 2d 603, the court by a 5-4 decision upheld Sec. 401 of the Nationality Act of 1940, providing for the forfeiture of American citizenship in consequence of voting by citizens in political elections in a foreign state.* The court defends the Act on the ground that its application is subject to judicial scrutiny, that is, the court says that specific applications of the provision as to political elections are open to judicial challenge. The court itself qualifies "political elections" by referring to them as elections of significance in a foreign coun-

*This, apparently, is erroneous. Whitaker, J., in his separate opinion says the court did not deem it necessary to pass on the constitutionality of the voting provision (401(e)) of the 1940 Nationality Act.

try. The determination of such significance is a judicial function under the court's decision.

The 1940 Act provided for judicial review by declaratory judgment as to the loss of citizenship by voting by a citizen in a foreign political election. The 1952 Act does not provide such review where the erstwhile citizen is without the United States, certainly not where he fails to obtain leave to return to apply for admission. Hence the court's defense of the 1940 Act as stated above, in the *Perez* case, *supra*, does not apply to the 1952 Act.

Senate amendments, which were adopted to the House Bill, which became the 1940 Nationality Act, included, *inter alia*, a provision for procedure by which persons administratively declared to have expatriated themselves might obtain judicial determination of their citizenship. 86 Cong. Rec. 12817-12818, *et ante*.

In enacting 8 USC Sec. 1503, Congress presumably had in mind the distinction laid down by *United States v. Ju Toy*, 198 U.S. 253, 49 L. ed. 1040; *Tang Tun v. Edsell*, 223 U.S. 673, 56 L. ed. 606; *Ng Fung v. White*, 259 U.S. 276, 66 L. ed. 938, between applicants for admission to the U. S. who were without and those who were within the U. S. at the time of the application. The former, it was held, may be adjudged never to have been citizens by executive officers, who are authorized finally to determine whether or not the person was a citizen by birth. In the case of the loss of citizenship as a result of voting abroad, the erst-

while citizen's former U. S. citizenship by birth is conceded and the question is whether executive officers may determine that he forfeited his citizenship. Does the authority of executive officers as determined by the above cited cases extend to the determination of whether, although a former citizen, a person has lost his citizenship? In both cases the result of the executive officer's decision may be to make of the applicant citizen an alien. But in the former there is the single fact issue of place of birth, while in the latter there are issues as to whether the erstwhile citizen voted voluntarily, the character of the voting, the kind of election i.e. whether it is one of political significance, as to whether the country in which the election is held must be a sovereign country and if so whether the country involved is a sovereign state, whether the act constituting the officers' authority is valid. It would be a travesty to assign purely legal problems to laymen; it would not comport with due process. So far as counsel knows the Supreme Court has never recognized the power of Congress to delegate such authority to executive officers. Indeed, the power of Congress to denationalize citizens by birth was first recognized and upheld in *Perez v. Brownell*, (1958) supra. The forfeiture of citizenship as provided in the 1952 Act, would seem to be analogous to statutory forfeitures in general, which require judicial determination. 37 C.J.S. Forfeitures Sec. 5(b). The *Perez* case did not pass on the constitutionality of the voting provision (401(e)) of the 1940 Nationality Act. See separate opinion of J. Whitaker.

Congress may exclude aliens through the agency of executive officers. In the nature of things, these officers will make mistakes and exclude citizens. But the exclusion of citizens is not intended and is only an inevitable incident of the exercise of the power to exclude aliens. It does not follow however, that Congress may make an alien of an acknowledged citizen through the agency of executive officers.

The distinction between resident and non-resident citizens with respect to the remedy provided by 8 USC Sec. 1503, is arbitrary, unreasonable and capricious, being based on the innocuous and fortuitous circumstance of their whereabouts when they are alleged to have forfeited their citizenship by the secret ballot. This appears in the case of a dual citizen, residing in the U. S., who votes by absentee ballot in an election held in the other country of which he is a citizen. Japanese Nationals may so vote, though Nationals of the U. S. and residing here. No reason is perceived why such a citizen should be in a more favored position to contest his loss of citizenship than the citizen who did the same thing while abroad and thereby incurred the same loss.

8 USC Sec. 1503 (b and c) being invalid as a substitute for Sec. 503 of the Nationality Act of 1940, the latter section survives repeal by the 1952 Nationality Act.

IV.

SAVINGS CLAUSE OF 1952 ACT.

Pertinent parts of the Savings Clause of the 1952 Act (8 USC Sec. 1101, note) follow:

Nothing contained in this Act shall be construed to affect . . . any status, condition, . . . act, thing, liability, obligation or matter done or existing at the time this Act shall take effect; but as to all such conditions, acts, things, statuses, liabilities, obligations or matters, the statutes or parts of statutes repealed by this Act are . . . hereby continued in force and effect.

The all inclusive language of the Savings Clause of the 1952 Act indicates that the Statutory status *quo ante* was intended to be preserved. Literally construed the Savings Clause would seem to mean that Sec. 360 (b and c), the procedural section, of the Act shall not affect the act of voting by a citizen in a foreign political election prior to the effective date of the Act or his consequent status, liability or obligation, as to which things Sec. 503 of the 1940 Nationality Act, the procedural section is continued in force.

If Congress intended to preserve the remedy provided by the 1940 Act so far as forfeiture of citizenship, its enforcement and relief therefrom are concerned, its intention so to do would override any artificial general rule of construction that savings clauses do not preserve remedies where new remedies are provided. That Congress did so intend seems to be clear.

There is nothing in the Savings Clause of the 1952 Act, making affirmative action by the erstwhile citizen

or by the government a condition to the application of the clause; a mere condition unaccompanied by an affirmative act suffices, *United States v. Menascha*, 348 U.S. 538. See *United States v. Cain*, 147 F. Supp. 449, construing the Savings Clause of the 1940 Act.

The 1952 Act operates prospectively (*United States v. Menascha*, 348 U.S. 538, *supra*). The Act applies to voting by a citizen in a foreign political election after its effective date and provides a remedy for loss of citizenship because of such voting. It leaves the voting provision of the 1940 Act unaffected as well as provisions relating to the act of voting, the consequent loss of citizenship and the related remedy provided therefor. The sweep of the Savings Clause of the 1952 Act cannot be restricted so as to preclude this result.

It is respectfully submitted that the judgment below be reversed and that the case be remanded for further proceedings.

Dated, Honolulu, T. H.,
May 11, 1959.

BRAHAN HOUSTON,
Attorney for Appellants.

No. 16,279

United States Court of Appeals
For the Ninth Circuit

LILLIAN HISAKO SATO and BLANCHE
MASAKO SATO,

Appellants,

vs.

JOHN FOSTER DULLES, Secretary of
State of the United States,

Appellee.

On Appeal from the United States District Court
for the District of Hawaii in Civil No. 1519.

APPELLEE'S ANSWERING BRIEF.

LOUIS B. BLISSARD,

United States Attorney,

District of Hawaii,

Honolulu, Hawaii,

Attorney for Appellee.

FILED

JUN 24 1959

PAUL P. O'BRIEN, CLERK

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No. 16,279

**United States Court of Appeals
For the Ninth Circuit**

LILLIAN HISAKO SATO and BLANCHE
MASAKO SATO,

Appellants,

vs.

JOHN FOSTER DULLES, Secretary of
State of the United States,

Appellee.

**On Appeal from the United States District Court
for the District of Hawaii in Civil No. 1519.**

APPELLEE'S ANSWERING BRIEF.

**JURISDICTIONAL STATEMENT AND
STATEMENT OF THE CASE.**

By their Amended Complaint below, Appellants prayed for a judgment declaring that they were nationals of the United States, and that they did not lose their United States citizenship by reason of having voted in elections held in Japan. They alleged that the District Court had jurisdiction by virtue of Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 USCA Section 903, and Section 405 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, note to 8 USCA, Section 1101.

The original complaint was filed on November 20, 1956. The pertinent allegations of the Amended Complaint filed June 5, 1958, are:

That Appellant Lillian Hisako Sato was born in Hawaii on August 22, 1928, and Appellant Blanche Masako Sato was born in Hawaii on September 24, 1917; that their parents were Japanese nationals and that, consequently, Appellants were citizens of the United States by birth, and citizens of Japan by descent; that in 1940 their parents took them from Hawaii to Japan for a visit, and that they desired to return to Hawaii as soon after the war as transportation was available, but were unable, until 1955, to defray the expense of returning; that on November 22, 1955, Appellant Lillian, and on March 7, 1956, Appellant Blanche applied to the American Consul in Fukuoka, Japan, for registration or a passport to return to Hawaii; that in response to said applications, the American Consul executed a Certificate of the Loss of Nationality of the United States as to Appellant Lillian on April 30, 1956, and as to Appellant Blanche on August 1, 1956; that both certificates were approved by the Secretary of State and notices thereof were communicated to Appellants thereafter; that the certificate as to Appellant Lillian was based on her voting in the Japanese political elections on April 10, 1946, and the certificate as to Appellant Blanche was based on her voting in such elections on April 23, 1951, April 30, 1951, July 20, 1951, October 1, 1952 and December 20, 1954; that they did so vote but only involuntarily and under pressure, duress and coercion.

The Appellee here moved to dismiss, which dismissal was granted on the ground that the Court lacked jurisdiction of the subject matter. This is an appeal from that order of dismissal, and this Court has jurisdiction of the appeal by virtue of 28 USC, Sections 1291 and 1294(1).

ARGUMENT.

Section 401 of the Nationality Act of 1940 (8 USCA, Section 801) applies to dual nationals as well as those who are nationals of the United States only. No proper grounds of jurisdiction were alleged in that the Amended Complaint contained no allegation that the applications for passports or travel documents had been filed prior to December 24, 1952. The "savings clause," moreover, provides no jurisdictional anchor for Appellants.

I

SECTION 401 OF THE NATIONALITY ACT OF 1940 (8 USCA, SECTION 801) APPLIES TO DUAL NATIONALS AS WELL AS THOSE WHO ARE NATIONALS OF THE UNITED STATES ONLY.

Section 401 of the Nationality Act of 1940 (8 USC, Section 801) in pertinent part provides as follows:

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

- • • • • • •
- (e) Voting in a political election in a foreign state or participating in an election or

plebiscite to determine the sovereignty over foreign territory”¹

Appellants concede the constitutionality of this provision, citing *Perez v. Brownell*, 356 U.S. 44, but contend that the provision has no application to a dual national, i.e., an American citizen who also has the nationality of the country in which he votes. It is difficult to perceive how there can be any ambiguity read into this provision: “A person who is a national of the United States” can mean just that and cannot be construed to mean persons who are nationals of the United States *only*. Even if there were such ambiguity as to require a court to look to the legislative history, that history itself provides the answer to Appellants’ argument. *Perez v. Brownell, supra*, at 52-56, discusses the origin of the expatriation provision involved herein.

In the early 1930s the President established a committee composed of the Secretary of State, the Attorney General and the Secretary of Labor to review the nationality laws of the United States, to recommend revisions, and to codify the nationality laws into one comprehensive statute for submission to Congress. This Cabinet Committee’s draft code was an omnibus bill in five chapters. The chapter relating to “Loss of Nationality” provided, among other things, that any citizen should lose his nationality by voting in a foreign political election or plebiscite. In

¹The same provision is incorporated in Section 349 of the Immigration and Nationality Act of 1952, 8 USC, §1481.

support of this recommendation as an act of expatriation, the committee reported:

“Taking an active part in political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, *whether or not the person in question has or acquires the nationality of the foreign state.*” (emphasis supplied). Codification of the Nationality Laws of the United States, H.R. Comm. Print Pt. 1, 76th Cong., 1st Sess. V-VII, page 67.

In 1938 the President submitted the Cabinet Committee's draft code and the supporting report to Congress. In due course, Chairman Dickstein introduced the code as H.R. 6127, and it was referred to his committee. In early 1940 extensive hearings were held, during which period Mr. Flournoy, Assistant Legal Advisor to the State Department, said that the provision would be “particularly applicable” to persons of dual nationality; however, a suggestion that the provision be made applicable only to dual nationals was not adopted. Hearings Before the House Committee on Immigration and Naturalization on H.R. 6127, 76th Cong., 1st Sess. 287 at pp. 132 and 398. Upon the conclusion of the hearings in 1940 a new bill was drawn up and introduced as H.R. 9980. The only changes from the Cabinet Committee draft with respect to the act of expatriation were immaterial as far as this discussion is concerned. The House debated the bill in September 1940. In briefly summarizing the loss of nationality provisions of the bill,

Chairman Dickstein said that "this bill would put an end to dual citizenship and relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purpose." 86th Cong. Rec. 11944.

II

NO PROPER GROUNDS OF JURISDICTION WERE ALLEGED IN THAT THE AMENDED COMPLAINT CONTAINED NO ALLEGATION THAT THE APPLICATIONS FOR PASSPORTS OR TRAVEL DOCUMENTS HAD BEEN FILED PRIOR TO DECEMBER 24, 1952.

Section 503 of the Nationality Act of 1940 (8 USC, Section 903) provides in pertinent part as follows:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia, or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in Court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic

or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the Court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the Court that he is not a national of the United States . . .”

This section was repealed by the Immigration and Nationality Act of 1952, effective December 24, 1952, 66 Stat. 166, 8 USCA, Section 1101 et seq. Section 360 (a) of this 1952 act, 8 USCA, Section 1503 (a), authorizes, with certain exceptions, an action for declaratory judgment under the Declaratory Judgment Act by a person claiming citizenship *who is in the United States* and whose claim is denied. Sub-paragraph (b) of this section provides as follows:

“If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an applica-

tion for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. . . .”

Subsection (c) of this same section provides as follows:

“A person who has been issued a certificate of identity under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. . . .”

In establishing the new procedure as to such persons outside the United States, and providing that a final exclusion by the Attorney General can be reviewed by the courts in habeas corpus proceedings and not otherwise, Congress clearly intended to take from persons in the position of Appellants the right to bring an action for declaratory judgment. *D’Argento v. Dulles*, DC, DC 1953, 113 Fed. Supp. 933.

In addition to its clarity on the face of the Act of 1952, that intent was unequivocally expressed in the

report of the Senate Committee on the Judiciary Subcommittee, which recommended the passage of the bill:

“One significant and far-reaching proposal is that which would restrict the right of a person who is denied American nationality by an agency or department of the Government from bringing a declaratory judgment to have his citizenship status determined. Under present law such a person may bring such an action whether he is within the United States or abroad. The bill restricts this privilege to those who are within the United States.” Senate Report 1515, 81st Cong., 2nd Sess., p. 810.

That Congress has the power to do this seems beyond cavil. No constitutional rights, including those under the due process clause, are infringed. Furthermore, that the statutory remedy provided by the 1952 enactment may be a harsh departure from the legislative policy that there should be liberal judicial review of administrative action is a matter for Congressional, not judicial, consideration. *D’Argento v. Dulles*, *supra*.

III

THE “SAVINGS CLAUSE” OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 HAS NO APPLICABILITY HERE.

The “savings clause,” Section 405 of the Immigration and Nationality Act of 1952 (8 USCA, Section 1101, note), does not preserve to Appellants the right

to a declaratory judgment. The "savings clause" provides in part that:

"(a) Nothing contained in this Act [this Chapter] unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act [this Chapter] shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this act [this Chapter] shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [sic] conditions, rights, acts, things, liabilities, obligations, or matters, the statutes or parts of statutes repealed by this Act [this Chapter] are, unless otherwise specifically provided therein, hereby continued in force and effect. . . ."

Appellants are not within those holdings such as *Junso Fujii v. Dulles*, 9 Cir., 224 F.2d 906, where affirmative action had been taken by the plaintiff prior to the repeal of the old act. Cf. *Lew Hsiang v. Brownell*, 7 Cir., 234 F.2d 232; *Yung Jim Teung v. Dulles*, 2 Cir., 229 F.2d 244. Nor can they point to any substantive rights existing at the time the statute creating the rights was repealed. The "rights" are in fact procedural remedies and thus not preserved by the "savings clause." See *Aure v. U.S.*, 9 Cir., 225 F.2d 88, 90.

The first affirmative action taken here was in 1955 and 1956 when Appellants applied for passports or registration. Nothing referred to by the "savings clause" existed as to Appellants at the time the 1952 Act took effect except their "status" or "condition." The only such status or condition of Appellants, however, was their alleged citizenship, and this is not itself "affected." What alone is affected, as to Appellants, is the procedure by which that status or condition is to be determined, and that change is clearly "specifically provided." Such provision is within the power of Congress. *Barber v. Yanish*, 2 Cir., 196 F.2d 53; *Matsuo v. Dulles*, SD Cal., 133 Fed. Supp. 711.

Judicial review, except by habeas corpus (and that not at this stage of the administrative proceedings) being thus expressly precluded by Section 360 of the Immigration and Nationality Act of 1952, the District Court properly dismissed the Amended Complaint for lack of jurisdiction.

CONCLUSION.

The judgment of the District Court should be affirmed.

Dated, Honolulu, Hawaii,
June 12, 1959.

Respectfully submitted,
LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,
Attorney for Appellee.



No. 16285 ✓

**United States
Court of Appeals**
for the Ninth Circuit

**CITIZENS NATIONAL TRUST AND SAVINGS
BANK OF LOS ANGELES,**

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

FILED

FEB 25 1959

PAUL P. O'BRIEN, CLERK

**Appeal from the United States District Court for the
Southern District of California
Central Division**



No. 16285

United States
Court of Appeals
for the Ninth Circuit

**CITIZENS NATIONAL TRUST AND SAVINGS
BANK OF LOS ANGELES,**

Appellant,

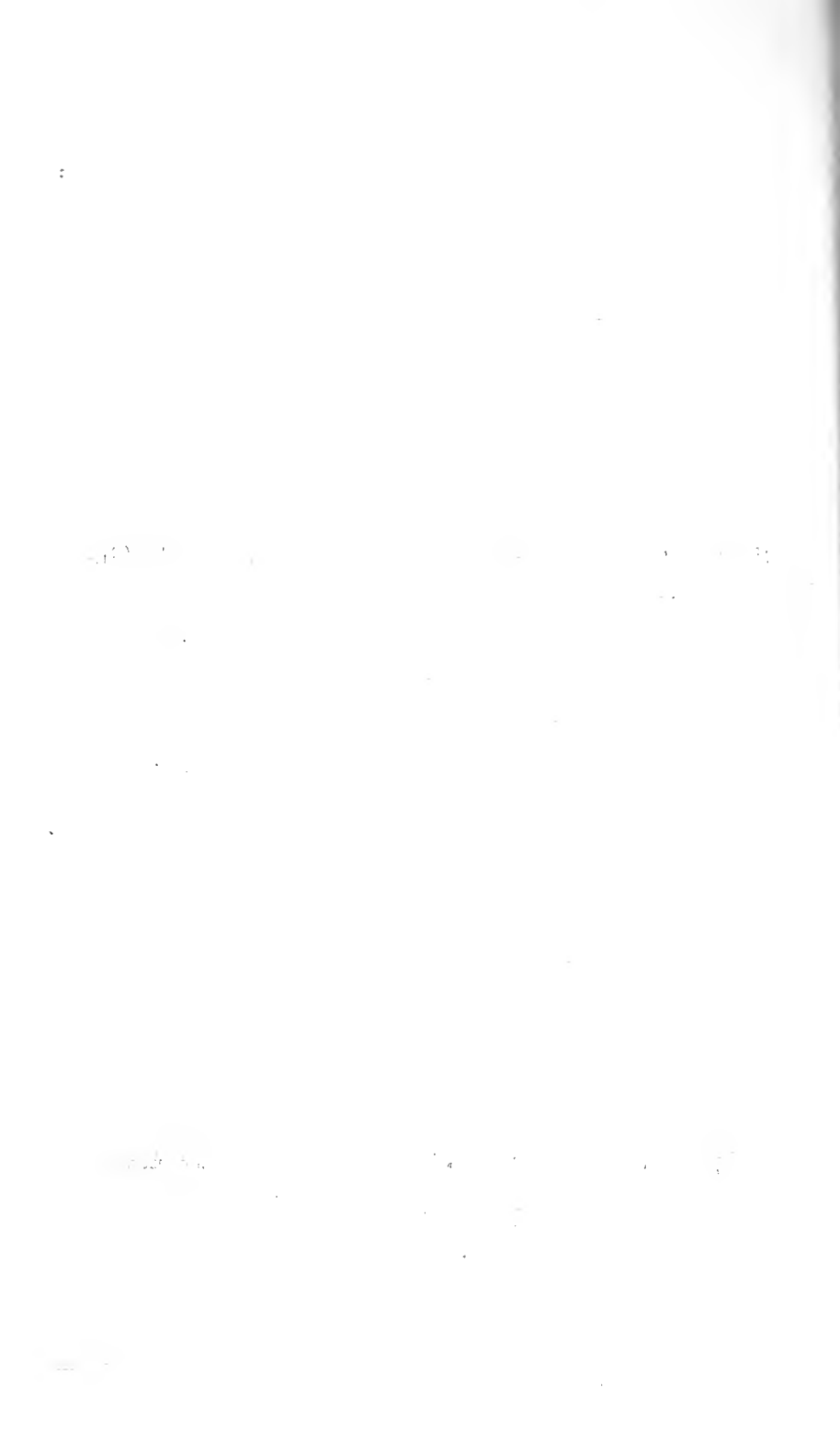
vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Central Division**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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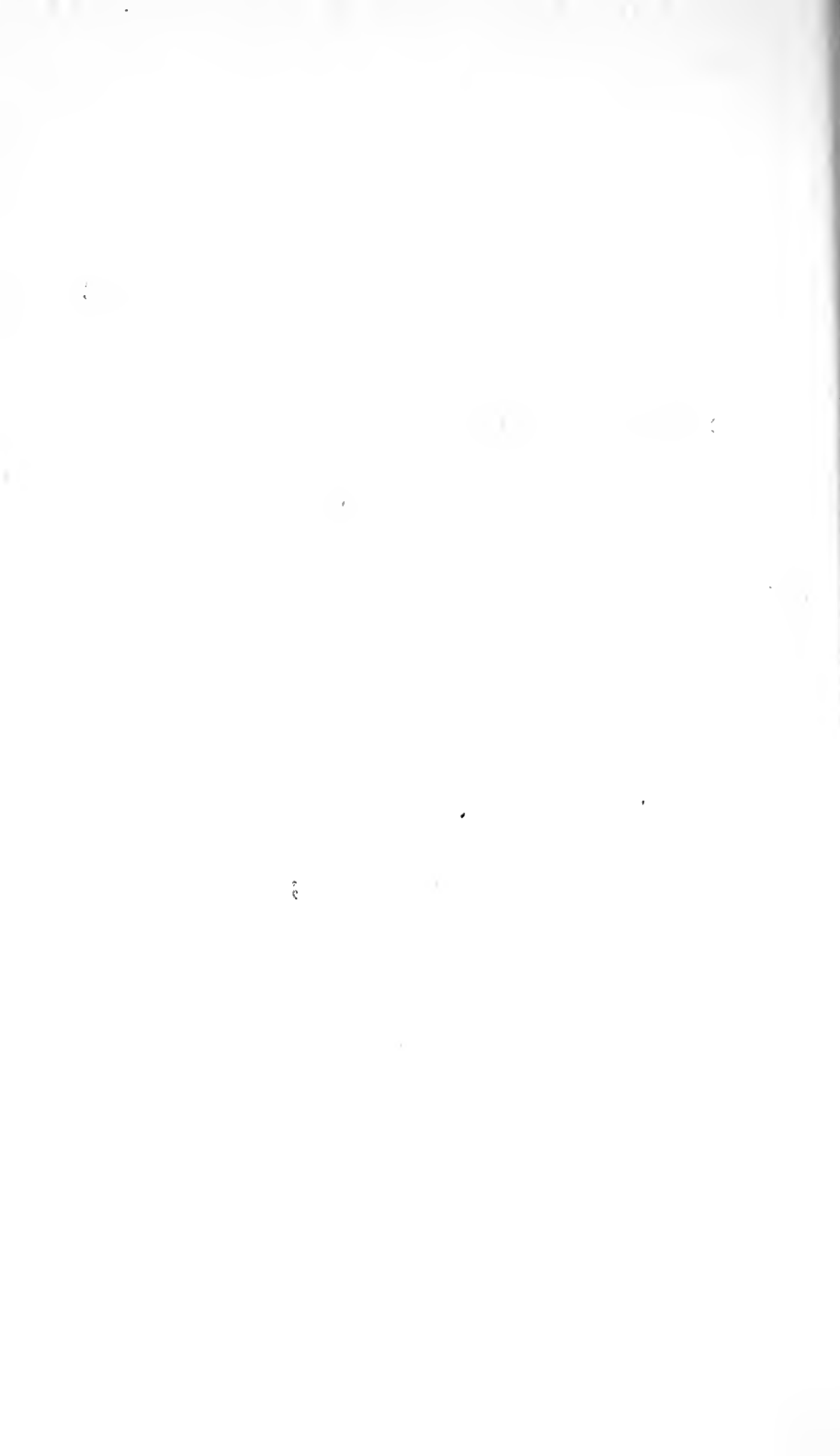
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United States District Court, Southern District of
California, Central Division

No. 54-58—HW—Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITIZENS NATIONAL TRUST AND SAVINGS
BANK OF LOS ANGELES, a National Bank-
ing Association,

Defendant.

FIRST AMENDED COMPLAINT FOR RECOV-
ERY OF MONEY PAID UNDER MISTAKE,
AND FOR BREACH OF CONTRACT

Plaintiff complains of the defendant and alleges:

First Cause of Action

I.

That the United States, during all the time herein mentioned, was and now is a corporation sovereign.

II.

That this action is brought in the above-entitled Court pursuant to provisions of Title 28, Section 1345 U.S.C. by reason of which the United States of America is named herein as plaintiff.

III.

That the defendant during all times hereinafter mentioned was and now is a national banking asso-

ciation, organized and existing under and by virtue of the laws of the United States of America, having a place of business in the City of Los Angeles, County of Los Angeles, and State of California, and within the jurisdiction of the United States District Court for the Southern District of California. [12*]

IV.

That the within action arises out of a transaction involving the National Housing Act, as amended; and Section 2(g) of said Act (12 U.S.C., Section 1703(g)) provides:

“The Administrator is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this Title.”

V.

That the regulations of the Administrator enacted pursuant to the aforesaid Section 2(g) of said Act, requires that a note be valid and enforceable in order to qualify for insurance.

VI.

That on or about April 17, 1952, George D. Bashore executed and delivered to Durastone Company as principal, his promissory note in writing, dated on said date, wherein said George D. Bashore promised to pay for value received to the order of said principal the sum of \$1,638.46. Execution and delivery of said promissory note was under the terms of Title I of the National Housing Act. Under the

terms of said Act, the Federal Housing Administrator, acting for and on behalf of the United States of America, insured the payment of said promissory note at the special instance and request of the defendant.

VII.

Thereafter the said payee of said note transferred said note by endorsement to defendant Citizens National Trust & Savings Bank of Los Angeles.

VIII.

note, the defendant holder of the note, Citizens Na-

Thereafter, upon default by the payor of said tional Trust & Savings Bank of Los Angeles, acting under the terms of aforesaid Act, made demand for reimbursement of the amount remaining due from, and was duly paid said sum by the Federal Housing Administrator, acting for and on [13] behalf of the United States of America. Thereupon said note was assigned to plaintiff United States of America.

IX.

That Citizens National Trust and Savings Bank of Los Angeles is charged with notice of the Regulations promulgated by the Federal Housing Administrator, including aforesaid Section 2(g) of said Act, requiring that a note be valid and enforceable in order to qualify for reimbursement of the Bank under the insurance contract.

X.

That by judgment filed September 28, 1956, in the case of United States of America v. George D. Ba-

shore, et al., No. 19527-WM Civil, in the United States District Court, Southern District of California, Central Division, the Honorable William C. Mathes presiding, it was adjudged that the aforesaid note was void and unenforceable, and that defendant Citizens National Trust and Savings Bank of Los Angeles discounted said promissory note with knowledge that said note was void and unenforceable.

XI.

That the note being void and unenforceable, defendant Citizens National Trust and Savings Bank of Los Angeles failed to conform with the aforesaid Regulations of the Administrator, and was, therefore, not entitled to reimbursement on the note under said provisions.

XII.

Defendant Citizens National Trust and Savings Bank of Los Angeles, a national banking association, is indebted to plaintiff in the sum of \$793.84, together with interest at the rate of 6% from June 23, 1955, said amount being the erroneous payment in reimbursement on said note to said defendant by the Federal Housing Administrator as set forth herein. Though duly demanded, no part of said sum has been repaid. [14]

Second Cause of Action

For a Separate, Further, and Second Cause of Action, plaintiff complains and alleges:

I.

Plaintiff repleads all of the allegations contained in paragraphs I, II, III, and IV of its First Cause of Action, and hereby incorporates same in this Second Cause of Action.

II.

That at all times mentioned herein, the defendant Citizens National Trust and Savings Bank of Los Angeles was the insured party to a contract of insurance, the insuring party being the Federal Housing Commissioner, acting for and on behalf of the United States of America, said contract of insurance being entered into under and governed by the provisions of Title I of the National Housing Act, as amended (12 U.S.C., Section 1703).

III.

That said contract of insurance, by its provisions, required the insured party, defendant Citizens National Trust & Savings Bank of Los Angeles, to abide by its terms and by the Regulations of the Administrator enacted pursuant to the aforesaid Section 2(g) of the National Housing Act.

IV.

That the regulations of the Administrator enacted pursuant to the aforesaid Section 2(g) of said Act require that a note be valid and enforceable in order to qualify for insurance.

V.

That on or about April 17, 1952, George D. Ba-

shore executed and delivered to Durastone Company as principal his promissory note in writing, dated on said day, wherein said George D. Bashore promised to pay for value received to the order of said principal the sum of \$1,638.46. Execution and delivery of said promissory note was under the terms of Title I of the National Housing Act. Under the terms [15] of said Act, the Federal Housing Administrator, acting for and on behalf of the United States of America, insured the payment of said promissory note at the special instance and request of the defendant.

VI.

Thereafter the said payee of said note transferred said note by endorsement to defendant Citizens National Trust & Savings Bank of Los Angeles.

VII.

Thereafter, upon default by the payor of said note, the defendant holder of the note, Citizens National Trust & Savings Bank of Los Angeles, acting under terms of its contract and the Regulations of the Federal Housing Commissioner issued under terms of aforesaid Act, made a Title I Claim for Loss and demand for reimbursement of the amount remaining due under said note from, and was duly paid said sum on or about June 23, 1955, by the Federal Housing Administrator acting for and on behalf of the United States of America.

VIII.

That in his claim for loss, defendant certified that

the terms of the aforesaid contract and the aforesaid regulations had been complied with.

IX.

That in fact, the terms of aforesaid contract and regulations had not been complied with, by reason of the fact that the said note was void and unenforceable, and was so declared by Judgment filed September 28, 1956, in the case of United States of America v. George D. Bashore, et al., No. 19527-WM Civil, in the United States District Court, Southern District of California, Central Division, the Honorable William C. Mathes presiding.

X.

That as a result of the breach of the terms of said contract, the plaintiff has been damaged in amount equal to the sum paid defendant by the Federal Housing Commissioner under terms of the [16] contract and regulations, plus interest, said sum amounting to \$793.84, together with interest at the rate of 6% from June 23, 1955.

Wherefore, plaintiff prays judgment against the defendant Citizens National Trust and Savings Bank of Los Angeles in the sum of \$793.84, together with interest at the rate of 6% per annum from June 23, 1955, for its costs incurred in this action, and for such other and further relief as to the Court shall be deemed proper.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ ALFRED B. DOUTRE,
Assistant U. S. Attorney;
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 7, 1958. [17]

[Title of District Court and Cause.]

ANSWER TO FIRST
AMENDED COMPLAINT

Defendant answers plaintiff's first amended complaint as follows:

Answer to Plaintiff's First Cause of Action

I.

Admits the allegations contained in paragraphs I to X, inclusive.

II.

Answering paragraph XI, defendant denies each and every allegation therein contained.

III.

Answering paragraph XII, defendant denies each and every allegation therein contained. Denies that it is indebted to plaintiff in the sum of \$793.84 together with interest at the [19] rate of 6% from June 23, 1955, or any sum, or any interest. Admits

however that demand was made by plaintiff upon defendant to pay the same to plaintiff and that it has not paid the same to plaintiff, or any part thereof.

Answer to Plaintiff's Second Cause of Action

IV.

Admits the allegations contained in paragraphs I to VIII, inclusive.

V.

Answering paragraph IX, defendant denies that in fact the terms of said contract and regulations had not been complied with by reason of the fact that said note was void and unenforceable, or otherwise. Admits that said note was in effect declared to be void and unenforceable by judgment filed September 28, 1956, in the case of United States of America v. George D. Bashore, et al., No. 19527-WM Civil, in the United States District Court, Southern District of California, Central Division, the Honorable William C. Mathes presiding.

VI.

Answering paragraph X, denies that defendant breached the terms of said contract. Denies that the plaintiff has been damaged in any sum or sums occasioned or as the result of any breach of the terms of said contract by this defendant, or otherwise.

Defenses

First Defense

VII.

That defendant is not and was not made a party to action No. 19527-WM Civil referred to in plain-

tiff's first amended complaint. That defendant is not a party to the judgment made [20] and given in said action and is not in privity with any party thereto. That defendant is a stranger to said judgment.

VIII.

That defendant is not bound by the adjudications made in said action No. 19527-WM Civil and is not bound by the judgment rendered therein for the reasons set forth in the preceding paragraph.

IX.

That when the promissory note referred to in plaintiff's first amended complaint was assigned to the plaintiff by defendant as alleged by plaintiff in paragraph VIII of its first cause of action the plaintiff took over and assumed exclusive control of the collection of said promissory note. That thereafter plaintiff sued the defendant George D. Bashore in said action No. 19527-WM Civil in this court and in which action this defendant bank was not a party. That in said action plaintiff had and exercised complete control of the prosecution thereof.

Second Defense

X.

For a separate and distinct defense arising on the face of the first amended complaint herein, defendant says that the facts alleged in said first amended complaint are insufficient to state a claim upon which relief can be granted.

Wherefore, defendant prays judgment that the first amended complaint of the plaintiff be dismissed with costs to the defendant, that plaintiff recover nothing by its said complaint against defendant, and that defendant have such other and further relief in the premises as the Court shall deem proper.

/s/ HENRY MERTON,
Attorney for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 14, 1953. [21]

[Title of District Court and Cause.]

STIPULATION FOR AMENDMENT OF AMENDED COMPLAINT

It Is Hereby Stipulated by and between the parties to this action through their respective counsel, that plaintiff's First Amended Complaint for Recovery of Money Paid Under Mistake and for Breach of Contract be amended by interlineation as follows:

Following the last word, namely "unenforceable", of paragraph X of said First Amended Complaint, a comma will replace the period, and the following words will be added: "and by virtue of said judgment said note was and is unenforceable by the plaintiff".

Dated: This 7th day of April, 1958. [42]

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ALFRED B. DOUTRE,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

/s/ HENRY MERTON,
Attorney for Defendant.

It Is So Ordered: This 7th day of April, 1958.

/s/ WILLIAM C. MATHES,
United States District Judge.

[Endorsed]: Filed April 7, 1958. [43]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the plaintiff and defendant herein, through their respective counsel, as follows:

1. That as alleged in plaintiff's complaint, on or about April 17, 1952, one George D. Bashore executed and delivered to Durastone Co., as principal, his promissory note in writing dated on said date

wherein the said Bashore promised to pay, for value received, to the order of said principal, the sum of \$1,638.46. The execution and delivery of said note was under the terms of Title I of the National Housing Act. That under the terms of said Act the Federal Housing Administrator acting for and on behalf of plaintiff insured the payment of said note at the special instance and request of defendant bank. [44]

2. That thereafter the payee of the note, to wit, Durastone Co., as principal, transferred the same by endorsement to defendant bank. Thereafter the maker, Bashore, after making some eighteen monthly payments on the note defaulted and failed to pay any further payments thereon. Thereafter, by reason of said default, defendant bank acting under the terms of the aforementioned National Housing Act made demand for reimbursement of the amount remaining due on the note, to wit, the sum of \$793.84, and the same was paid by the Federal Housing Administrator and the note was transferred by defendant bank to the plaintiff. The transfer of said note to plaintiff by defendant bank was evidenced by the latter's endorsement on the reverse side thereof containing the words: "All right, title and interest of the undersigned is hereby assigned (without warranty, except that the note qualifies for insurance) to the United States of America." That the defendant bank in making demand for reimbursement of the balance remaining unpaid on said note to the Federal Housing Administration

certified that the terms of the contract and of the regulations have been complied with.

3. That following the transfer of the note to plaintiff, as aforementioned, plaintiff on or about February 21, 1956, filed an action against the maker, Bashore, to collect the balance due and unpaid on said note, and being the action referred to in plaintiff's complaint, to wit, No. 19527-WM Civil, in the United States District Court, Southern District of California, Central Division. Judgment in said action was that the plaintiff, United States of America, take nothing from the defendant Bashore on its complaint. A copy of said judgment of the court in said action is attached hereto, marked Exhibit "A", and by reference made a part hereof. [45]

4. Defendant bank herein was not made a party to the said action and is not a party to the judgment made and given therein as aforesaid.

5. That as alleged in plaintiff's complaint, at all times mentioned therein defendant bank was the insured party to a contract of insurance, the insuring party being the Federal Housing Commissioner, acting for and on behalf of the United States of America, said contract of insurance being entered into under and governed by the provisions of Title I of the National Housing Act, as amended (12 U.S.C., Sec. 1703). That the said contract of insurance by its provisions require the insured party to abide by its terms and by the regulations of the Administrator enacted in pursuance thereto.

Dated: July 21, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division;

By /s/ ALFRED B. DOUTRE,
Assistant U. S. Attorney; Attorneys for Plaintiff
United States of America.

/s/ HENRY MERTON,
Attorney for Defendant. [46]

EXHIBIT A

United States District Court, Southern District of
California, Central Division

Civil No. 19527-WM

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE D. BASHORE, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled matter having come on regularly for trial on September 11, 1956, before the

Honorable William C. Mathes, and the Court having considered the evidence and being fully advised in the premises, makes the following Findings of Fact, Conclusions of Law and Judgment:

Findings of Fact

I.

That the defendant, George D. Bashore, was at the time of the filing of the Complaint a resident of the County of Los Angeles, State of California and within the jurisdiction of the United States District Court for the Southern District of California.

II.

That plaintiff, United States of America, seeks recovery on a promissory note dated April 17, 1952, signed by defendant, George D. Bashore, and made payable to the order of Durastone Co., transferred by endorsement to Citizens National Trust and Savings [47] Bank of Los Angeles, and assigned after default to plaintiff.

III.

That on or about April 17, 1952, defendant, George D. Bashore, was approached by agents of the Durastone Co., and that said agents misrepresented basic facts to said defendant in that said defendant was informed and believed that certain mastic paint would be applied to the defendant's home free of charge; that said defendant did execute and sign the Promissory Note and other docu-

ments in question, the true effect of which was misrepresented to him.

IV.

That defendant, George D. Bashore, did not know or ascertain until long after the event that he had signed the instrument in suit or any other document negotiable in form.

V.

That the consideration promised to defendant by the Durastone Co. has not been received by said defendant and is totally lacking.

VI.

That the within action arises out of a transaction involving the National Housing Act, as amended; and Section 2(g) of said Act, (12 U.S.C., Section 1703(g)) provides:

“The Administrator is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this Title.”

VII.

That the Regulations of the Administrator enacted pursuant to the aforesaid Section 2(g) of said Act, requires that a note be valid and enforceable in order to qualify for insurance.

VIII.

That since the Citizens National Trust and Savings Bank of [48] Los Angeles, supplied the named payee-dealer with the bank's own printed

forms of Promissory Note and Federal Housing Administration Title I Credit Application for use in the transaction involved, the bank was charged with knowledge that the transaction was subject to the Regulations promulgated by the Federal Housing Administrator.

IX.

That inasmuch as the Citizens National Trust and Savings Bank of Los Angeles is charged with notice of the Regulations promulgated by the Federal Housing Administrator, the same bank took the Promissory Note dated April 17, 1952, with knowledge of the defects therein and did not therefore become a holder in due course.

X.

That the relationship between the payee of the Promissory Note dated April 17, 1952, sued on herein, to wit: Durastone Co., and the Citizens National Trust and Savings Bank of Los Angeles, as to the entire transaction giving rise to said Promissory Note, was such that said bank must be considered in effect a party to the original transaction between the named payee and the defendant, George D. Bashore.

XI.

That the plaintiff became a holder of the Promissory Note dated April 17, 1952, after maturity and with notice of the defect therein; and that the Court further finds that plaintiff did not derive its

title to said Promissory Note through a holder in due course.

Conclusions of Law

As Conclusions of Law from the foregoing Findings of Fact, this Court concludes that:

I.

The United States of America at all times herein mentioned was and now is a corporate sovereign and that this Court has [49] jurisdiction of the subject matter of the within Complaint under the provisions of Title 28, U.S. Code, Section 1345.

II.

That defendant, George D. Bashore, is within the jurisdiction of the United States District Court for the Southern District of California.

III.

That defendant, George D. Bashore, by his conduct and lack of knowledge may not under the evidence presented be held negligent.

IV.

The Citizens National Trust and Savings Bank of Los Angeles did not become a holder in due course of the Promissory Note dated April 17, 1952, sued on herein.

V.

Plaintiff, United States of America, is not a

holder in due course of the Promissory Note dated April 17, 1952, nor does it hold said Note through a holder in due course, and plaintiff holds said Note subject to the defenses of failure of consideration, fraud and misrepresentation.

VI.

That the Citizens National Trust and Savings Bank of Los Angeles discounted the said Promissory Note with knowledge that said note was void and unenforceable.

VII.

Defendant, George D. Bashore, is not indebted to plaintiff in the transactions sued upon in this Complaint.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed:

1. That the plaintiff, United States of America, take nothing from Defendant, George D. Bashore, on its Complaint; [50]
2. That each party shall bear his own costs in the within action.

Dated: This 28th day of September, 1956.

WM. C. MATHES,
United States District Judge.

Filed Sept. 28, 1956.

CLERK,

U. S. Dist. Ct., So. Dist. of Calif.

Docketed and Entered Sept. 28, 1956.

CLERK,

U. S. Dist. Ct., So. Dist. of Calif.

[Endorsed]: Filed July 21, 1958. [51]

[Title of District Court and Cause.]

MEMORANDUM OF OPINION

This is an action arising out of an express warranty indorsement by defendant herein upon a promissory note.

On February 21, 1956, the United States of America commenced an action in the United States District Court for the Southern District of California against George D. Bashore, et al., No. 19,527—WM, to recover upon an installment promissory note which it alleged the defendant had executed and delivered to Durastone Company, as principal. Execution and delivery of the promissory note were under the terms of Title I of the National Housing Act, under which Act the [75] Federal Housing Administrator, acting for and on behalf of the United States of America, insured payment of said promissory note.

Durastone Company, payee of the note, negotiated it to the defendant in this action, Citizens National Trust & Savings Bank of Los Angeles, which then became the holder thereof. The maker, George D. Bashore, paid eighteen monthly installments on the note and then, on the 1st day of November, 1953, refused to make any other or further payments, contending the note was not valid and enforceable as it had been obtained from him by fraud on the part of the payee. When the maker refused further payments, the bank as holder of the note, acting under the terms of the Federal Housing Act, made demand for reimbursement from the Federal Housing Administrator; and the Federal Housing Administrator, for and on behalf of the United States of America, paid to the bank the sum of \$793.84, whereupon the bank indorsed the note as follows:

“All right, title and interest of the undersigned is hereby assigned without warranty, except that the note qualifies for insurance, to the United States of America.”

After indorsement the note was transferred to plaintiff which became the holder thereof.

Subsequent thereto, action No. 19,527—WM, supra, was filed in the United States District Court for the Southern District of California against Defendant Bashore, maker of the note. Defendant Bashore appeared and answered the complaint, alleging the note was void and unenforceable as to him on the ground that it had been obtained by

fraud. Trial was duly had. Findings of fact, conclusions of law and [76] judgment were filed by the Court. The Court found that the payee had obtained the note by fraud and, consequently, the note was void and unenforceable as to the defendant, George D. Bashore. Judgment was duly entered. Time for appeal has expired, and the judgment is now final.

Subsequent to judgment in Case No. 19,527-WM, plaintiff filed the action at bar to recover from the bank the sum of \$793.84 paid at the time of the indorsement and transfer of the note, together with interest at the rate of 6% per annum from the date of said payment.

Defendant bank duly appeared and answered the amended complaint filed in the action and subsequently entered into a stipulation of facts. Defendant bank contends the indorsement on the note was without recourse.

It is the government's contention, however, that defendant bank is liable upon its indorsement as, by the indorsement, defendant bank had warranted that the note qualified for insurance.

If the note qualified for insurance, there is no liability upon the bank. If, however, it did not qualify for insurance, the defendant bank is liable upon its express warranty.

To qualify for insurance the regulations contain the following provision:

“1. Validity. The note shall bear the genuine signature of the borrower as maker, shall be valid and enforceable against the borrower * * * and shall be complete and regular on its face * * *”

There is no dispute between the parties in the action at bar that the note bore the genuine signature of the borrower as maker, and it is also agreed that the note was [77] complete and regular on its face. The dispute between the parties arises out of the meaning of the term “shall be valid and enforceable against the borrower.”

The United States District Court for this district, having jurisdiction of the parties and the issues, rendered a judgment finding the note void and unenforceable against the borrower. (United States vs. Bashore, No. 19,527—WM.) Defendant, however, contends it is not bound by such finding as it was not a party to the proceeding. If the government is to prevail in this action, it must recover upon the express warranty of the bank's endorsement—a warranty that the note qualified for insurance; that is, that it was valid and enforceable against the borrower.

The warranty of the bank was not that the note could be collected; its warranty was that the note was valid and enforceable against the borrower. A Judge of this court has heretofore held the note was not valid and enforceable against the borrower. We do not believe we can go behind such a finding. It would be untenable for a judge of the court in

one proceeding to hold the note void and unenforceable and for another judge of the same court to hold it valid and enforceable.

“* * * when an issue is once litigated and decided, that should be the end of the matter * * *”

United States vs. U. S. Smelting Co.,
339 U. S. 186 at 198.

In the case of *Rojas-Gutierrez vs. Hoy*, 161 F. Supp. 448, Judge Mathes wrote as follows:

“The Court of Appeals of this Circuit has quoted with approval the proposition [78] stated in *Shreve v. Cheesman*, 8 Cir., 1895, 69 F. 785, 791, certiorari denied 1896, 163 U. S. 704, 16 S. Ct. 1206, 41 L. Ed. 320, that the ‘various judges who sit in the same court should not attempt to overrule the decisions of each other * * * except for the most cogent reasons.’ [Citations.]

“For judges of co-ordinate jurisdiction to presume to overrule one another usually adds only unseemly conflict and confusion where certainty and predictability are most to be desired. The ‘overruling’ decision settles nothing and more often than not serves only to compound uncertainty as to the correct rule to be followed. The reasons so well put by Judge Sanborn more than a half century ago in *Shreve v. Cheesman*, *supra*, a fortiori apply today. [Citations.]

“Unless a judge can say that he thinks a decision of a colleague is on the face of it patently erroneous,

he should follow it. Especially is this true of decisions in the same case, and of decisions in different cases involving rules of practice and procedure or rules of property or, as here, the status of persons. Cf.: *Dictograph Products Co. v. Sonotone Corp.*, 2 Cir., 1956, 230 F. 2d 131; *TCF Film Corp. v. Gourley*, supra, 240 F. 2d 711.

“In the days when Justices of the Supreme Court ‘rode the circuit’ and presided in the trial courts, Mr. Justice Field [79] sitting as a Circuit Justice in the then Circuit Court of the District of Nevada, upon being importuned to dissolve an injunction which had been issued by the circuit judge, wrote: ‘I could not with propriety reconsider his decision, even if I differed from him in opinion. The circuit judge possesses * * * equal authority with myself in the circuit, and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case.’ *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.*, C.C.D. Nev., 1871, 6 Fed. Cas., pages 72, 74, No. 2,990.”

In the case at bar the bank expressly warranted the note to be valid and enforceable. The warranty would be good regardless of the knowledge possessed by the bank. The bank when it made its warranty may have been of the opinion the note was valid, but the warranty goes beyond actual knowledge of the bank. The warranty was that the note was valid. As a Judge of this court has heretofore held the

note was invalid and unenforceable against the maker, we believe we are bound by the findings of our brother judge. And the bank is bound by its warranty.

Plaintiff is instructed to prepare findings of fact, conclusions of law and judgment in conformity with this memorandum of opinion and according to the rules, for presentation for signature on or before the 30th day of September, 1958.

Dated: September 17, 1958.

/s/ HARRY C. WESTOVER,

District Judge.

[Endorsed]: Filed September 17, 1958. [80]

United States District Court, Southern District
of California, Central Division

Civil No. 54-58-HW

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITIZENS NATIONAL TRUST AND SAVINGS
BANK OF LOS ANGELES, a National Bank-
ing Association,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

The above-entitled matter having come on regularly for trial, July 21, 1958, before the Honorable

Harry C. Westover, Judge presiding, subsequent memoranda having been filed at the direction of the Court by each party, and the Court having considered the evidence and being fully advised in the premises, makes the following Findings of Fact, Conclusions of Law, and Judgment:

Findings of Fact

I.

That this action is brought in the above-entitled court pursuant to the provisions of Title 28, Section 1345 U.S.C. by reason of which the United States of America is named herein as plaintiff. [81]

II.

That the United States was and now is a corporation sovereign, and defendant, a national banking association having a place of business in Los Angeles, California, and within the jurisdiction of this court.

III.

That on or about April 17, 1952, one George D. Bashore executed and delivered to Durastone Co., as principal, his promissory note in writing dated on said date wherein the said Bashore promised to pay, for value received, to the order of said principal, the sum of \$1,638.46. The execution and delivery of said note was under the terms of Title I of the National Housing Act. That under the terms of said Act the Federal Housing Administrator acting for and on behalf of plaintiff insured

the payment of said note at the special instance and request of defendant Bank.

IV.

That thereafter the payee of the note, to wit, Durastone Co., as principal, transferred the same by endorsement to defendant Bank. Thereafter the maker, Bashore, after making some eighteen monthly payments on the note defaulted and failed to pay any further payments thereon. Thereafter, by reason of said default, defendant Bank acting under the terms of the aforementioned National Housing Act made demand for reimbursement of the amount remaining due on the note, to wit, the sum of \$793.84, and the same was paid by the Federal Housing Administrator and the note was transferred by defendant Bank to the plaintiff. The transfer of said note to plaintiff by defendant Bank was evidenced by the latter's endorsement on the reverse side thereof containing the words: "All right, title and interest of the undersigned is hereby assigned (without warranty, except that the note qualifies for insurance) to the United States of America." That the defendant Bank in [82] making demand for reimbursement of the balance remaining unpaid on said note to the Federal Housing Administration certified that the terms of the contract and of the regulations have been complied with.

V.

That following the transfer of the note to plaintiff, as aforementioned, and after unsuccessful col-

lection efforts, plaintiff on or about February 21, 1956, filed an action against the maker, Bashore, to collect the balance due and unpaid on said note, and being the action referred to in plaintiff's complaint, to wit, No. 19527-WM Civil, in the United States District Court, Southern District of California, Central Division. Defendant Bashore appeared and answered the complaint, alleging the note was void and unenforceable as to him on the ground that it has been obtained by fraud. Trial was duly had. Findings of Fact, Conclusions of Law, and Judgment were filed by the Court. Judgment was entered against plaintiff, United States of America, the Court finding that the payee had obtained the note by fraud, that the payee's endorsee, the Citizens National Trust and Savings Bank of Los Angeles, was not a holder in due course, and the note was void and unenforceable as to the defendant, George D. Bashore.

VI.

That time for appeal has expired, and the judgment in said case No. 19527-WM is now final.

VII.

That defendant Bank herein was not made a party to the said action and is not a party to the judgment made and given therein as aforesaid.

VIII.

That at all times mentioned herein defendant Bank was the insured party to a contract of in-

insurance, the insuring party being the Federal Housing Commissioner, acting for and on behalf of [83] the United States of America, said contract of insurance being entered into under and governed by the provisions of Title I of the National Housing Act, as amended (12 USC, Sec. 1703). That the said contract of insurance by its provisions requires the insured party to abide by its terms and by the regulations of the Administrator enacted in connection therewith. That said regulations of the Administrator require that a note be valid and enforceable against the borrower or borrowers in order to qualify for insurance.

IX.

That through defendant Citizens National Trust and Savings Bank of Los Angeles was not made a party to the said action No. 19527-WM Civil in the United States District Court, Southern District of California, defendant and its counsel were in fact informed of said action previous to trial.

X.

That subsequent to judgment in case No. 19527-WM, plaintiff filed this action at law to recover from the bank the sum of \$793.84 paid at the time of the endorsement and transfer of the note, together with interest at the rate of 6% per annum from the date of said payment.

Conclusions of Law

I.

That the United States District Court for this District, having jurisdiction of the parties and the issues, rendered a judgment finding the note void and unenforceable against the borrower (United States vs. Bashore, No. 19,527-WM).

II.

A judge of this court heretofore having held that the note was not valid and enforceable against the borrower, this court cannot go behind such a finding. A judge of the court in one proceeding will not hold the note void and unenforceable when another judge of the same court has held it valid and enforceable. [84]

III.

The warranty of the bank was that the note qualified for insurance, that is, was valid and enforceable against the borrower, not that the note could be collected.

IV.

The bank having expressly warranted the note to be valid and enforceable, said warranty is binding regardless of the knowledge possessed by the bank.

V.

Said warranty of defendant bank was breached, and said defendant Citizens National Trust and Savings Bank is thereby liable to the United States of America under said warranty.

VI.

The United States of America is entitled to recover from defendant Citizens National Trust and Savings Bank thereunder in the sum of \$793.84 plus interest.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law it is hereby Ordered, Adjudged, and Decreed:

1. That the judgment be entered in favor of plaintiff, United States of America, against defendant, Citizens National Trust and Savings Bank, Los Angeles, in the sum of \$793.84, together with interest at the rate of 6% per annum from June 23, 1955.

2. Plaintiff, United States of America, shall have and recover from defendant, Citizens National Trust and Savings Bank, all costs incurred in this action in the sum of \$.....

Dated: This 8th day of October, 1958.

/s/ HARRY C. WESTOVER,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged October 1, 1958.

[Endorsed]: Filed and entered October 8, 1958.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND
NOTICE OF MOTION

Defendant moves the court for an order granting a new trial in the above-entitled action in which judgment was entered on October 8, 1958, on the following ground:

1. Insufficiency of the evidence to support the decision of the court in that the only evidence before the court and upon which plaintiff relies to support its claim of uninsurability of the note concerned, is that in an action it had brought against the maker of the note, and in which defendant, the insured bank, was not a party, it was adjudged that plaintiff take nothing against the maker, and that the court had ruled in effect, that the note was void and unenforceable against the maker; that said action did not test the insurability of the note; that insured bank is not bound by the judgment made and given therein; that the judgment does not constitute evidence [87] that the note did not qualify for the insurance, and does not constitute evidence that the insured bank had failed to abide by the terms of the contract of insurance and by the terms of the Regulations of the Administrator enacted in pursuance thereto; that it is not evidence that defendant bank breached its warranty that the note qualified for insurance.

Said motion will be based upon all of the plead-

ings on file in said action, and the stipulation of facts upon which the case was submitted for action.

Dated: This 15th day of October, 1958.

/s/ HENRY MERTON,
Attorney for Defendant.

Notice of Motion for New Trial

To: Laughlin E. Waters, U. S. Attorney, Richard A. Lavine, Assistant U. S. Attorney, Alfred B. Doutre, Assistant U. S. Attorney.

Please Take Notice that the undersigned will bring the above motion on for hearing before this court in the court room of the Honorable Judge Harry C. Westover on Monday, November 3, 1958, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard.

Dated: October 15, 1958.

/s/ HENRY MERTON,
Attorney for Defendant.

[Endorsed]: Filed October 16, 1958. [88]

[Title of District Court and Cause.]

DENIAL OF MOTION FOR NEW TRIAL

The above cause having come on for hearing, November 3, 1958, on Defendant's Motion for New Trial before the Honorable Harry C. Westover, plaintiff being represented by Laughlin E. Waters,

United States Attorney, Richard A. Lavine and Alfred B. Doutre, Assistants United States Attorney, Alfred B. Doutre appearing, and defendant appearing through its counsel, Henry Merton, memoranda having been submitted, argument having been heard, and the Court being fully advised in the premises hereby denies defendant's Motion for New Trial.

Dated: This 4th day of November, 1958.

/s/ HARRY C. WESTOVER,
United States District Judge.

Lodged November 3, 1958.

[Endorsed]: Filed November 4, 1958. [101]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Citizens National Trust and Savings Bank of Los Angeles, a National Banking Association, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on October 8, 1958.

/s/ HENRY MERTON,
Attorney for Appellant Citizens National Trust and Savings Bank of Los Angeles.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 25, 1958. [102]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages number 1 to 107, inclusive, containing the original:

Complaint.

Notice of Motion by Defendant for more definite statement.

Response to Defendant's Motion for more definite statement.

Minute Order 2/17/58 re hearing on motion for more definite statement, etc.

First Amended Complaint.

Answer to First Amended Complaint.

Notice of Motion by Defendant for Summary Judgment.

Affidavit of Attorney for Defendant in support of motion for summary judgment.

Memorandum of Points and Authorities in support of Defendant's Motion for summary judgment.

Statement of Facts re Defendant's motion for summary judgment.

Opposition to Motion for Summary Judgment, Statement of Genuine Issues; Memorandum of Points and Authorities in support of opposition to Motion for Summary Judgment.

Stipulation for Amendment of Amended Complaint.

Stipulation of Facts.

Memorandum of contentions of Fact and Law.

Memorandum of Points and Authorities (plaintiff).

Defendant's Reply to Plaintiff's Memorandum of Points and Authorities.

Memorandum of Opinion.

Findings of Fact, Conclusions of Law and Judgment.

Motion for New Trial and Notice of Motion.

Written Statement of reasons in support of Motion for New Trial and Memorandum of Points and Authorities in reliance thereon.

Opposition to Motion for New Trial, Points and Authorities.

Denial of Motion for New Trial.

Notice of Appeal.

Designation of contents of Record on Appeal.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: December 9, 1958.

JOHN A. CHILDRESS,
Clerk.

[Seal] By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16285. United States Court of Appeals for the Ninth Circuit. Citizens National Trust and Savings Bank of Los Angeles, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 10, 1958.

Docketed: December 12, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 16285

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

CITIZENS NATIONAL TRUST AND SAVINGS
BANK OF LOS ANGELES, a National Bank-
ing Association,

Defendant and Appellant.

STATEMENT BY APPELLANT OF POINTS
ON WHICH IT INTENDS TO RELY

Appellant, Defendant above named, states that the points upon which it intends to rely on appeal in this action are as follows:

In this action, wherein the plaintiff (appellee), by its first amended complaint, seeks to recover back money paid to appellant as the insured party, on a promissory note made and executed by one Bashore under the terms of Title I of the National Housing Act, and in which action judgment was given in favor of plaintiff, the appellee, and is the judgment herein appealed from, the Court erred in holding that:

1. Appellant was bound by a judgment made and given by the United States District Court,

Southern District of California, Central Division, in an action brought by appellee, plaintiff, against the said Bashore, being case No. 19,527-WM, on said promissory note, wherein the Court had purportedly or in effect found that said note was invalid and unenforceable against the borrower, (Bashore), and in which action and judgment appellant herein was not a party or in privity with any party to the said action and judgment;

2. In holding that appellant, defendant, expressly warranted the note to be valid and enforceable, whereas it had warranted only that the note qualified for insurance under the terms of the said National Housing Act;

3. That the evidence adduced by appellee, plaintiff, in support of its action, which consisted only of the fact of the judgment rendered against it in its afore-mentioned action against the said Bashore, was sufficient to grant appellee, plaintiff, the relief sought for in its said complaint;

4. That the said note was not eligible for insurance;

5. That the warranty of appellant, defendant, that the note in question would qualify for insurance was breached;

6. That appellee, plaintiff, was entitled to recover from appellant, defendant, wherein there was no evidence presented to the Court of any breach of the contract of insurance and/or of the regula-

tions of the Federal Housing Administrator pertaining thereto; and

7. That the mere fact alone that appellee, plaintiff, had lost its action against the borrower on said note, and in which action appellant, defendant, was not a party, had no control over prosecution of same, the conduct of the trial or the presentation of evidence, constituted evidence of a breach by appellant, defendant, of the insurance contract concerned.

Dated: December 18, 1958.

/s/ HENRY MERTON,
Attorney for Appellant.

[Endorsed]: Filed December 20, 1958.

No. 16285.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS
ANGELES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
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PAUL P. O'BRIEN, CLERK



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No. 16285.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS
ANGELES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTION.

Appellee, the United States of America, commenced its action against Appellant in the United States District Court for the Southern District of California, Central Division, designated Civil Action No. 54-58-HW, on January 20, 1958.

Appellee's action involved a transaction under the National Housing Act, as amended, and was brought in the said United States District Court pursuant to the provisions of Title 28 U. S. C., Section 1345. Appellant Bank, as the defendant in said action, was and now is a national banking association, organized and existing under and by virtue of the laws of the United States of America, and

at all relevant times had a place of business in the City of Los Angeles, County of Los Angeles, and State of California, and thus was and is within the jurisdiction of the said United States District Court. Therefore, by virtue of the foregoing, said Court had jurisdiction over the subject matter of said action and the parties thereto.

The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgment given in said action, pursuant to Title 28 U. S. C., Section 1291.

II.

STATUTES AND REGULATIONS INVOLVED.

Statute.

The National Housing Act, as amended, 12 U. S. C., Section 1703:

“(a) The Commissioner is authorized and empowered upon such terms and conditions as he may prescribe, to insure banks . . . and other such financial institutions, which the Commissioner finds to be qualified by experience or facilities and approves as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit . . . made by them on and after July 1, 1939 and prior to July 1, 1955, for the purpose of financing alterations, repairs, and improvements upon or in connection with existing structures . . . by the owners thereof. . . .

“(g) The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter.”

Regulations.

24 C. F. R. 201.2 Definitions

- (a) “Act” means the National Housing Act, as amended.
- (b) “Administration” means the Federal Housing Administration.
- (c) “Commissioner” means the Federal Housing Commissioner or his duly authorized representative.
- (d) “Contract of Insurance” includes all of the provisions of the regulations in this part and of the applicable provisions of the Act.

* * * * *

- (i) “Borrower” means one who applies for and receives a loan in reliance upon the provisions of the Act and whose interest in the property to be improved is (1) a fee title, or (2) a life estate, or (3) an equitable interest under an instrument of trust or contract, or (4) a lease having a fixed term, expiring not less than six calendar months after maturity of the loan.
- (j) “Class 1(a) Loan” means a loan . . . which is for the purpose of financing the repair, alteration, or improvement of an existing structure or of the real property in connection therewith, exclusive of the building of new structures. The term “existing structure” is a completed building that has or had a distinctive functional use.”

24 C. F. R. 201.3 “Eligible Notes—(a) Validity

The note shall bear the genuine signature of the borrower as maker, shall be valid and enforceable against the borrower or borrowers as defined in Section 201.2(i), and shall be complete and regular on its face. . . .”

24 C. F. R. 201.11 "*Claims—(a) Claim application*

Claim for reimbursement for loss on an eligible loan shall be made on a form provided by the Commissioner, and executed by a duly qualified officer of the insured. The claim shall be accompanied by the insured's complete credit and collection file pertaining to the transaction."

(g) *Form of assignment.*

The following form of assignment properly dated shall be used in assigning a note, judgment, real estate mortgage, deed of trust, conditional sales contract, chattel mortgage, mechanic's lien, or any other security device in event of claim:

'All right, title, and interest of the undersigned is hereby assigned (without warranty, except that the note qualifies for insurance) to the United States of America.

(Financial Institution)

By -----

'Date ----- Title -----' "

24 C. F. R. 201.16 "*Effective date*

The regulations in this part are effective as to all loans made on or after July 1, 1947, pursuant to the provisions of Title 1 of the National Housing Act as amended, and shall have the same force and effect as if included in and made a part of each Contract of Insurance."

III.

STATEMENT OF THE CASE.

This case was submitted to the trial court for decision primarily upon a written Stipulation of Facts [R. 14-16]. Said Stipulation is as follows:

“1. That as alleged in plaintiff’s complaint, on or about April 17, 1952, one George D. Bashore executed and delivered to Durastone Co., as principal, his promissory note in writing dated on said date wherein the said Bashore promised to pay, for value received, to the order of said principal, the sum of \$1,638.46. The execution and delivery of said note was under the terms of Title I of the National Housing Act. That under the terms of said Act the Federal Housing Administrator acting for and on behalf of plaintiff insured the payment of said note at the special instance and request of defendant bank.

“2. That thereafter the payee of the note, to wit, Durastone Co., as principal, transferred the same by endorsement to defendant bank. Thereafter the maker, Bashore, after making some eighteen monthly payments on the note defaulted and failed to pay any further payments thereon. Thereafter, by reason of said default, defendant bank acting under the terms of the aforementioned National Housing Act made demand for reimbursement of the amount remaining due on the note, to wit, the sum of \$793.84, and the same was paid by the Federal Housing Administrator and the note was transferred by defendant bank to the plaintiff. The transfer of said note to plaintiff by defendant bank was evidenced by the latter’s endorsement on the reverse side thereof containing the words: ‘All right, title and interest of the undersigned is hereby assigned (without warranty, except that the note qualifies for insurance) to the United States of

America.' That the defendant bank in making demand for reimbursement of the balance remaining unpaid on said note to the Federal Housing Administration certified that the terms of the contract and of the regulations have been complied with.

"3. That following the transfer of the note to plaintiff, as aforementioned, plaintiff on or about February 21, 1956, filed an action against the maker, Bashore, to collect the balance due and unpaid on said note, and being the action referred to in plaintiff's complaint, to wit, No. 19527-WM Civil, in the United States District Court, Southern District of California, Central Division. Judgment in said action was that the plaintiff, United States of America, take nothing from the defendant Bashore on its complaint. A copy of said judgment of the court in said action is attached hereto, marked Exhibit 'A,' *and by reference made a part hereof.* (Emphasis supplied.)

"4. Defendant bank herein was not made a party to the said action and is not a party to the judgment made and given therein as aforesaid.

"5. That as alleged in plaintiff's complaint, at all times mentioned therein defendant bank was the insured party to a contract of insurance, the insuring party being the Federal Housing Commissioner, acting for and on behalf of the United States of America, said contract of insurance being entered into under and governed by the provisions of Title I of the National Housing Act, as amended (12 USC, Sec. 1703). That the said contract of insurance by its provisions require the insured party to abide by its terms and by the regulations of the Administrator enacted in pursuance thereto."

The judgment of the trial court in the said case of *United States v. Bashore*, Civil No. 19527-WM [R. 17-

22], as referred to in Paragraph 3 of the foregoing Stipulation, appears as Exhibit "A" in the Transcript of Record, pages 17-22.

Although not agreed upon in the above Stipulation, the Appellee further averred in his "Memorandum of Points and Authorities" that, although the Appellant bank was not made a party to the aforesaid case of *United States v. Bashore*, Civil. No. 19527-WM, it was, in fact, informed of said action, and, indeed, had its counsel in attendance at and during the trial of said action. Said averment was not denied in the Appellant's "Reply to Plaintiff's Memorandum of Points and Authorities," or thereafter; and the trial court found that "though defendant Citizens National Trust and Savings Bank of Los Angeles was not made a party to the said action No. 19527-WM Civil, in the United States District Court, Southern District of California, defendant (Appellant) and its counsel were in fact informed of said action previous to trial" [R. 33].

In the Findings of Fact made by Judge Mathes in the aforesaid case of *United States v. Bashore* it was found, in effect, that the payee of the note, one Durastone Company, had misrepresented basic facts to the said defendant therein, as a result of which the latter was induced to execute and sign the Promissory Note and other documents connected therewith, "the true effect of which was misrepresented to him"; that said defendant "did not know or ascertain until long after the event that he had signed the instrument in suit or any other document negotiable in form"; that the consideration promised to said defendant by the Durastone Co. had not been received by him and is "totally lacking"; that since the Appellant herein had supplied the said payee with its own printed forms of Promissory Note and Federal Housing Administration Title I

Credit Application for use in the transaction involved, it was "charged with knowledge and the transaction was subject to the Regulations promulgated by the Federal Housing Administrator"; that since the Appellant was charged with notice of said regulations it took the Promissory Note with knowledge of the defects therein and therefore was not a holder in due course; that the Appellant was in such a relationship to the payee, the aforesaid Durastone Company, that it must be considered in effect a party to the original transaction between the payee and the defendant Bashore; and that the plaintiff (Appellee herein) became a holder of the Promissory Note after maturity and with notice of the defect therein and thus did not derive its title through a holder in due course [R. 17-21].

The conclusions of law reached by the trial court in the said case of *United States v. Bashore* were essentially as follows: That the defendant Bashore had not been negligent with respect to his part in the transaction; that the Citizens National Trust and Savings Bank (Appellant herein) did not become a holder in due course of the note in question; that the plaintiff (Appellee herein) is not a holder in due course of said note but held it subject to the defenses of failure of consideration, fraud, and misrepresentation; that the Citizens National Trust and Savings Bank (Appellant herein) discounted said note with knowledge that it was void and unenforceable; and that, consequently, the said defendant was not indebted to the plaintiff (Appellee herein) with respect to the transactions secured by said note [R. 17-22].

After submission of the instant case to the trial court herein for decision on the basis of said Stipulation of Facts, plus the undenied averment of the Appellee that the Appellant had been aware of the previous action of

United States v. Bashore and had, in fact, attended the trial thereof, the trial court, on October 8, 1958, filed its Findings of Fact and Conclusions of Law and rendered Judgment that the Appellee recover the sum of \$793.84 from the Appellant, together with interest at the rate of 6 per cent from June 23, 1955, and its costs [R. 29-35].

The primary Findings of Fact made by the trial court were that the transfer of said note to the Appellee by the Appellant Bank was evidenced by the latter's endorsement on the reverse side thereof containing the words: "All right, title and interest of the undersigned is hereby assigned (without warranty, except that the note qualifies for insurance) to the United States of America"; that the Appellant in making demand for reimbursement certified that the terms of the insurance contract and of the regulations had been complied with; that after said assignment of the note to the Appellee, the latter commenced an action against the payee, the aforesaid Bashore, but took nothing in said action because of findings to the effect that the payee had obtained the note by fraud; that the payee's endorsee, the Appellant herein, was not a holder in due course; that the note was void and unenforceable as to said defendant Bashore; that the time for an appeal from the aforesaid judgment has expired and that, therefore, it is final; that the Appellant herein "was not made a party to said action and is not a party to the judgment made and given therein"; that the contract of insurance requires that the insured party abide by the terms and regulations of the Administrator and that said regulations require that a note be "valid and enforceable against the borrower" in order to qualify for insurance; and that though the Appellant was not a party to said action of *United States v. Bashore*, it was "in fact informed of said action previous to trial" [R. 30-33].

The Conclusions of Law reached by the trial court herein were essentially that “a judge of this court heretofore having held that the note was not valid and enforceable against the borrower, this court cannot go behind such a finding”; that the Appellant warranted that the note qualified for insurance, “that is, was valid and enforceable against the borrower, not that the note could be collected”; that the Appellant, having expressly warranted the note to be valid and enforceable, is bound by this warranty regardless of its knowledge concerning any defects therein; that said warranty was breached and that, therefore, the Appellant is liable to the Appellee under said warranty [R. 34-35].

Thereafter, the Appellant moved the trial court for a new trial [R. 36-37] but on November 3, 1958, the court denied said Motion [R. 37-38].

Thereupon, the Appellant, on November 25, 1958, filed its Notice of Appeal from the aforesaid Judgment.

IV.

SUMMARY OF ARGUMENT.

A.

THE APPELLANT'S “SPECIFICATION OF ERRORS,” IN PART, IMPROPERLY SEEKS TO IMPEACH AND REPUDIATE ITS OWN STIPULATION OF FACTS IN THE TRIAL COURT.

B.

THE TRIAL COURT DID NOT ERR IN RULING THAT “A JUDGE OF THIS COURT HERETOFORE HAVING HELD THAT THE NOTE WAS NOT VALID AND ENFORCEABLE AGAINST THE BORROWER, THIS COURT CANNOT GO BEHIND SUCH A FINDING.”

C.

THE TRIAL COURT DID NOT ERR, AS APPELLANT CONTENDS, "IN CONCLUDING IN EFFECT THAT IN EVERY CASE WHERE A PROMISSORY NOTE IS MADE AND GIVEN UNDER THE TERMS OF TITLE I OF THE NATIONAL HOUSING ACT, AND IS LATER FOUND TO BE INVALID AND UNENFORCEABLE AGAINST THE BORROWER, THAT THIS IS NECESSARILY CONCLUSIVE THAT THE NOTE WOULD BE INELIGIBLE FOR THE INSURANCE COVERAGE UNDER SAID ACT" SINCE IT REACHED NO SUCH CONCLUSION AND SINCE SUCH A CONCLUSION WOULD BE SUPERFLUOUS IN ANY EVENT.

D.

THE TRIAL COURT DID NOT ERR, AS APPELLANT CONTENDS, BY "CASTING THE ROLE OF THE APPELLEE AS BEING THAT OF AN ASSIGNEE OF AN ORDINARY PROMISSORY NOTE, RATHER THAN THAT OF AN INSURER TO A LENDING INSTITUTION AGAINST LOSS OCCASIONED BY A LOAN MADE UNDER THE TERMS OF THE NATIONAL HOUSING ACT," BECAUSE THE TRIAL COURT APPLIED NO SUCH THEORY AND BECAUSE IN ANY EVENT, IT IS NOT THE THEORY APPLIED BUT THE CONCLUSION REACHED WHICH IS DETERMINATIVE.

E.

THE TRIAL COURT COULD PROPERLY REFUSE TO LITIGATE THE ISSUES ACTUALLY DECIDED IN UNITED STATES v. BASHORE BECAUSE OF PRIVITY OR A SIMILAR RELATIONSHIP BETWEEN APPELLANT AND APPELLEE.

F.

THE TRIAL COURT WAS CLEARLY CORRECT IN DECIDING THAT THE "NOTE" IN QUESTION, HAVING BEEN FOUND INVALID AND UNENFORCEABLE AGAINST THE BORROWER, DID NOT QUALIFY FOR INSURANCE AND, THEREFORE, THAT THE APPELLANT BREACHED ITS WARRANTY TO THE APPELLEE.

G.

THE APPELLEE IS NOT BARRED FROM RECOVERY BECAUSE IT VOLUNTARILY INDEMNIFIED THE APPELLANT UNDER A MISTAKE OF LAW.

V.

ARGUMENT.

A.

The Appellant's "Specifications of Errors," in Part, Improperly Seeks to Impeach and Repudiate Its Own Stipulation of Facts in the Trial Court.

Paragraph (1) of Appellant's "Specifications of Errors" erroneously avers that:

"The only evidence before the court, and relied upon by the Appellee on the issue of insurability, was the fact that Appellee's action brought against the borrower, and in which action Appellee was not a party, and which insurability of the note was not in issue, the court had awarded judgment in favor of the borrower" (Appellant's Br. p. 5).

Such contention completely ignores the fact that in the trial court the Appellant joined the Appellee in a "Stipulation of Facts," which under paragraph 3 thereof stated, *inter alia*:

"A copy of said judgment of the court in said action (U. S. v. Bashore, No. 19527-WM Civil) is attached hereto, marked Exhibit 'A' and *by reference made a part hereof.*" [Emphasis supplied; R. 14-16.]

By said Stipulation the parties to this appeal adopted, in effect, all of the 'basic' facts found by the trial court in said previous action between the Appellee and the borrower. The case was submitted to the trial court for decision on the basis of said Stipulation. Implicit in all of the trial briefs and the memoranda filed by both Appellant and Appellee is an acceptance of certain findings of fact made by the trial court in *United States v. Bashore*, notably those embodied in paragraphs II through VIII

thereof, along with that portion of paragraph XI which states:

“That the plaintiff (Appellee herein) became a holder of the Promissory Note dated April 17, 1952, after maturity and with notice of the defect therein.
 . . . ”

Also impliedly accepted by said Stipulation in conjunction with the trial briefs and memoranda was paragraph III of the Conclusions of Law in *United States v. Bashore*, to wit: “That defendant, George D. Bashore, by his conduct and lack of knowledge may not under the evidence presented be held negligent” [R. 21]. The appellant offered no evidence that Bashore, in fact, had been negligent, and has made no such contention in his written or oral arguments herein.

The trial briefs and memoranda indicate that the remaining relevant portions of the Findings of Fact in *United States v. Bashore* which, perhaps, can more accurately be described as ultimate facts or mixed findings of fact and law—were not agreed upon but presumably were at issue. These portions are as follows:

“IX. That . . . the same Bank took the Promissory Note dated April 17, 1952, with knowledge of the defect therein and did not therefore become a holder in due course.

“X. That the relationship between the payee of the Promissory Note dated April 17, 1952, . . . to wit, Durastone Co., and the Citizens National Trust and Savings Bank of Los Angeles, . . . was such that said Bank must be considered in effect a party to the original transaction between the named payee and the defendant, George D. Bashore.

“XI. . . . that the Court further finds that plaintiff (Appellee herein) did not derive his title to

said Promissory Note through a holder in due course.” [R. 20-21.]

It is significant that although it disputed the foregoing Findings, the Appellant introduced no evidence to show that they are erroneous. Consequently, his position at the trial and on this appeal was and is essentially that said conclusions are erroneously drawn from the stipulated facts.

Consequently, it is wholly unsound to argue, as has Appellant under said Paragraph (1) of its “Specifications of Errors,” that

“the only evidence before the court and relied upon by the Appellee on the issue of insurability, was the fact that in Appellee’s action brought against the borrower, and in which action the Appellant was not a party, and in which insurability of the note was not an issue, the court had awarded judgment in favor of the borrower.” (Appellant’s Br. p. 5.)

The trial court herein had before it a solid core of stipulated facts relative to the transaction and parties involved and to that core it added other findings of fact, and from all of the facts so found it reached its conclusions of law and final judgment.

The Appellant cannot have two shots at the same target. Having voluntarily elected to accept the said findings of fact in *United States v. Bashore*, it cannot repudiate them now.

Consequently, this review, *inter alia*, must be predicated upon the following findings of fact in *United States v. Bashore, supra*:

“III.

“That on or about April 17, 1952, defendant George D. Bashore was approached by agents of the Dura-

stone Co. and that said agents misrepresented basic facts to said defendant in that said defendant was informed and believed that certain mastic paint would be applied to the defendant's home free of charge; that said defendant did execute and sign the Promissory Note and other documents in question, *the true effect of which was misrepresented to him.*" (Emphasis supplied.)

"IV.

"That defendant, George D. Bashore, did not know or ascertain *until long after the event that he had signed the instrument in suit or any other document negotiable in form.*" (Emphasis supplied.)

"V.

"That the consideration promised to defendant by the Durastone Company has not been received by said defendant and is totally lacking.

VII.

That the Regulations of the Administrator enacted pursuant to the aforesaid Section 2(g) of said Act, requires that a note be valid and enforceable in order to qualify for insurance.

VIII.

That since the Citizens National Trust and Savings Bank of Los Angeles, supplied the named dealer-payee with the bank's own printed forms of Promissory Note and Federal Housing Administration Title I Credit Application for use in the transaction involved, the Bank was charged with knowledge that the transaction was subject to the Regulations promulgated by the Federal Housing Administrator." [R. 18-20.]

B.

The Trial Court Did Not Err in Ruling That “A Judge of This Court Heretofore Having Held That the Note Was Not Valid and Enforceable Against the Borrower, This Court Cannot Go Behind Such a Finding.”

As shown above, Judge Westover, the trial judge herein, by virtue of said Stipulation between the parties, had before him the same facts relative to the execution of the “promissory note” as had Judge Mathes in *United States v. Bashore*. Under these facts, Judge Westover’s conclusion that the note was not valid and enforceable against the borrower, as required by the Appellee’s regulations, is clearly correct, even if it be conceded, *arguendo*, that the reason he gave for this conclusion is unsound.

Under said Stipulation, and also as implied from the trial issues framed by the parties, the trial judge herein was required to assume that the maker of the note, George D. Bashore, was approached by agents of the Durastone Company; that said agents misrepresented basic facts to said defendant; that as a result said defendant was made to believe that certain mastic paint would be applied to defendant’s home free of charge; that said defendant did execute and sign a “promissory note” and other documents in question, the true effect of which was misrepresented to him; that defendant George D. Bashore did not know or ascertain until long after the event that he had signed the instrument in suit or any other document negotiable in form; that the consideration promised by the Durastone Company had not been received by the defendant and is totally lacking, and that the defendant, George D. Bashore, by his conduct and lack of knowledge may not under the evidence presented be held negligent [R. 19-21].

On such facts, it is well settled that the purported maker of the "Promissory Note" could not have executed a binding obligation, negotiable or otherwise. It has been found that Bashore did not know, because of the payee's fraud, that he was signing a "note." And where there is fraud in the *factum* there can be no note eligible for Title I insurance under any reasonable theory, whether or not the instrument is regarded as "complete and regular on its face." It cannot be denied that in assigning the instrument Appellant warranted that it was a "note" which qualified for insurance. If the instrument possessed none of the legal consequences of a note, the warranty was breached on that ground alone.

In *C. I. T. Corp. v. Panac* (1944), 154 P. 2d 710, 25 Cal. 2d 547, it was held that "absent negligence on the part of the maker, where the note was signed under a mistaken belief that it was a different instrument as a result of fraud on the part of the payee, it is not enforceable by a holder in due course." The Supreme Court of California pointed out that the common-law distinction between "fraud in the inducement" and "fraud in the factum" has been recognized in California since the adoption of the Uniform Negotiable Instruments Law.

25 Cal. 2d 550, 552.

As to the destruction of negotiability by fraud in the *factum* see *Brannon, Negotiable Instruments Law*, No. 55 (Beutel, 6th Ed. 1938); *Ames*, "Specialty Contracts and Equitable Defenses," 9 Harv. L. Rev. 49, 51-52; and *Williston on Contracts* (Rev. Ed.), Sec. 95A. These compendia indicate that the Uniform Negotiable Instruments Law, or similar statutory enactments, have not abrogated the common-law principle that fraud in the *factum* nullifies the "note."

Therefore, assuming that the law of California determines whether a promissory note, negotiable or otherwise was ever executed in this case, it is evident that the answer to such question must be in the negative. It is also evident that the same result would be reached under general principles of the common law, or under any statute or code which did not expressly or by necessary implication repeal the common-law rule. The provisions of the California Civil Code relative to negotiable instruments contain no such language, and none has been cited by the Appellant.

This well-settled principle renders meaningless the Appellant's argument that the requirement that the note be "valid and enforceable against the borrower" should be equated with the contiguous requirement that it be "complete and regular on its face" even though the two criteria are stated in the conjunctive. (The almost transparent fallacy of this contention is discussed below.) Clearly, insurability under the National Housing Act presupposes the execution of some form of instrument which could bind the maker in the hands of a holder in due course.

Since no binding instrument of any kind had been executed by the borrower herein, the Appellant did not assign to the Appellee any note which was "valid and enforceable against the borrower," however the quoted words be defined. It follows, in turn, that said "note" could not qualify for insurance under the requirements of 24 C. F. R. 201.3(a), *supra*, and that, therefore, the bank breached its warranty upon assigning it to the United States, as found by the trial court below.

In this connection, a very recent decision by the Fourth Circuit Court of Appeals in *United States v. Bland* (4 Cir., Nov. 13, 1958), F. 2d, is of considerable

relevancy. Bland had purchased storm windows from a contractor who, without recourse, assigned an F.H.A. insured note to the loan association. After default, the Commissioner paid the balance due and received an assignment. Thereupon, the United States sued the maker of the note, as in the related case of *United States v. Bashore* herein. The trial court held that the contractor had not complied with the Maryland Retail Installment Sales Act and that, therefore, the note was voidable. Consequently, judgment was given for the defendant, as in *United States v. Bashore*. However, the court observed that since the loan association had given a warranty to the United States that the note qualified for insurance, the United States might have a right to recover its loss from the loan association, although not from Bland. On appeal, the judgment was affirmed on the opinion below.

The dictum in *Bland* clearly conflicts with Appellant's argument that the test of insurability under the Federal Housing Act and its regulations is that the note be "complete and regular on its face." It appears that the note in *Bland* so qualified. Indeed, the *Bland* dictum goes farther than did the trial court herein, since it also appeared that the loan association there was not chargeable with knowledge that the said Installment Sales Act had been violated, whereas Judge Mathes in *United States v. Bashore* found that the appellant herein was chargeable with knowledge because of its close relationship to the defrauding payee. Presumably, the Fourth Circuit Court of Appeals held that since the Bland note was voidable *ab initio*, the loan association could not become a holder in due course under any circumstances since it had not acquired a valid instrument, which is essentially the situation present here.

Quite apart from the fact that the trial judge, having before him by stipulation the same basic facts as found by the court in *United States v. Bashore*, could not properly have reached any other conclusion but that the note in question was invalid and unenforceable, it is submitted that he would have been warranted in accepting the findings and conclusion of a brother judge of the same court in such a closely related case, involving the same note and the same transaction. As discussed more fully below, the parties to this appeal were in privity, bearing the relationship not only of assignor and assignee but of insured and insurer as well as of warrantor and warrantee. Moreover, the Appellant has impliedly conceded that he was informed of the action of *United States v. Bashore* before trial and that its counsel attended the trial. Under such circumstances, the rule, well-established in the Ninth Circuit, that one judge should not overrule the decision of a brother judge of the same court in the same case, or even in a different case involving the same rules of practice, procedure, property, or status, should apply. Reference is made to the trial judge's Memorandum of Opinion [R. 26-29] and to the citations given therein, some of which are discussed in greater detail below.

In *United States v. United States Smelting Company*, 339 U. S. 186 (1950), the Supreme Court of the United States said:

“The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter.”

339 U. S. 198.

As early as 1871 Justice Field, sitting as Circuit Justice in the case of *Cole Silver Mining Company v. Virginia and Gold Hill Water Company* (C. C. D. Nev. 1871), 6 Fed. Cas. 72, refused to entertain a motion to dissolve an injunction previously issued in the same case by another judge, reasoning that

“I could not with propriety reconsider his decision, even if I differed from him in opinion. The circuit judge possesses . . . equal authority with myself in the circuit, and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded or be open to review by the other judge in the same case.”

6 Fed. Cas. 74.

Although the above decision concerns a prior action within the same case, the situation here is analogous since by stipulation the parties accepted the same basic facts found in *United States v. Bashore*. Therefore, as to the common issue of the enforceability of the note, the two cases are identical.

Moreover, the rule of comity between judges of the same court has been extended so as to embrace different cases which present the same factual and legal problems. This is clearly shown by the dictum in *Shreve v. Cheesman* (8 Cir., 1895), 69 Fed. Rep. 785, cert. den. 163 U. S. 704. Although the facts in that case were peculiar and brought into focus a question of reliance and equitable estoppel not present here, the language of the court showed that it strongly approved the rule that judges of the same court should not overrule each other's decisions on similar questions, even in different cases. The court said:

“Nor has it been thought less vital to a wise administration of justice in the federal courts that the

various judges who sit in the same court should not attempt to overrule the decisions of each other, especially upon questions involving rules or property or of practice, except for the most cogent reasons.”

The court then cited with approval *Cole Silver Mining Company v. Virginia and Gold Hill Water Company*, *supra*, as well as other earlier cases.

69 Fed. Rep. 791.

For a similar dictum in a more modern case, which shows that the foregoing rule of comity is well entrenched in the Third Circuit, see *C. T. F. Film Corp. v. Gowley* (3 Cir., 1957), 240 F. 2d 711, 713; for a contrary view see *Dictograph Products Co. v. Sonotone Corp.* (2 Cir., 1956), 230 F. 2d 131, 134-135.

If it be contended that the foregoing decisions are restricted to the same questions of law, it may be answered that the enforceability of the note against the borrower herein presents merely an issue of law, identical with that in *United States v. Bashore*, since the parties agreed to accept the basic findings in the latter case and offered no evidence as to anything else. Consequently, a contrary ruling by the trial judge in the instant case would have reversed the conclusion of a judge of the same court in a closely related case involving the same facts.

While *Carnegie National Bank v. City of Wolf Point* (9 Cir., 1940), 110 F. 2d 569, involved a conflict between judges of the same court *in the same case*, and thus is distinguishable to that extent, it is significant that this

court quoted with approval the statement of the Eighth Circuit in *Shreve v. Cheesman*, *supra*, that

“the various judges who sit in the same court should not attempt to overrule the decisions of each other, especially upon questions involving rules of property or of practice, except for the most cogent reasons.”

110 F. 2d 573.

In the very recent case of *Rojas-Gutierrez v. Hoy* (U. S. D. C. S. D. Cal. C. D. 1958), 161 Fed. Supp. 448, the trial judge ruled that the conclusion of a judge of the same court that marihuana is not a “narcotic drug” within the meaning of an amendment to the Immigration and Nationality Act should be approved by him “without further study” where it was not shown that such a conclusion was “patently erroneous.”

161 Fed. Supp. 451.

Said case is analogous to the one at bar since the identical question arose in a different case. Indeed, the ruling therein goes considerably further because in the instant situation some of the parties to both cases are in privity or other legal relationship and the basic facts are identical.

Moreover, it may logically be argued that by the afore-said Stipulation the Appellant, in effect, accepted the conclusion of the District Court in *United States v. Bashore* that the “note” was invalid and unenforceable against the borrower and elected to rest his case upon the argument that, even so, it was within the insurance coverage provided by the National Housing Act since it was “complete and regular on its face” and since Appellant had no actual knowledge of any infirmity in the instrument. Having made such election, it is much too late now to rescind it.

C.

The Trial Court Did Not Err, as Appellant Contends “in Concluding in Effect That in Every Case Where a Promissory Note Is Made and Given Under the Terms of Title I of the National Housing Act, and Is Later Found to Be Invalid and Unenforceable Against the Borrower, That This Is Necessarily Conclusive That the Note Would Be Ineligible for the Insurance Coverage Under Said Act” Since It Reached No Such Conclusion and Since Such a Conclusion Would Be Superfluous in Any Event (emphasis supplied).

Assuming, *arguendo*, the correctness of Appellant’s contention that under the National Housing Act and the regulations relative thereto a note, under certain circumstances, might be invalid and unenforceable against the borrower and still qualify for insurance—an assumption which is deemed wholly unsound—the fact remains that the trial court merely concluded that the “note” was not valid and enforceable against this particular borrower because its execution had been permeated by fraud to such an extent that he did not know he was signing a note. As shown above, this conclusion accords with the almost universally approved rule that fraud in the *factum* renders a purported note void, not only as against the payee but as against any successor in interest, regardless of the latter’s good faith. This, it follows that in the instant case no note in a legal sense was ever executed, so that the insurance provisions of the Act and its regulations, which undeniably require the execution of a written acknowledgment of indebtedness enforceable by a holder in due course, at least, were fatally violated.

The sole question presented here is whether the trial judge's conclusion that *this particular note was not qualified for insurance* is correct. If it is correct, then whether he reasoned from an unsound premise, or stated a correct one too broadly, is immaterial. Although the Appellee believes that any note not valid and enforceable against the borrower in the lender's hands is ineligible for insurance under the plain meaning of 24 C. F. R. 201.3(a) of the regulations, such a comprehensive question need not be decided here. It is difficult to understand how the Appellant can seriously argue that a note, admittedly impregnated with fraud to such an extent that the maker did not know the meaning or purpose of the instrument before him, can possibly qualify for insurance under the Act, whether or not the conduct of the Appellant was faultless. As explained in greater detail below, such a result would be wholly inconsistent with the general context and purpose of the Act and the specific requirements of its governing regulations.

Therefore, whether the trial court in *United States v. Bashore* was technically correct in ruling that the Appellant was not a holder in due course because it was chargeable with knowledge of the fraud, which ruling was adopted by the trial court herein, is immaterial. If said ruling be error, it is error which does not vitiate the ultimate conclusion that the instrument here in question did not qualify for insurance.

D.

The Trial Court Did Not Err, as Appellant Contends, by "Casting the Role of the Appellee as Being That of an Assignee of an Ordinary Promissory Note, Rather Than That of an Insurer to a Lending Institution Against Loss Occasioned by a Loan Made Under the Terms of the National Housing Act," Because the Trial Court Applied No Such Theory and Because in Any Event, It Is Not the Theory Applied but the Conclusion Reached Which Is Determinative.

If any answer to such a flimsy specification is necessary, reference to Finding VIII by the trial judge [R. 32-33], in conjunction with his Conclusion of Law III [R. 34], is a sufficient refutation. The Appellant concedes that it assigned the "note" to the Appellee without recourse but subject to a warranty that it "qualified for insurance." The trial judge ruled, in effect, that a note which was invalid and unenforceable against the borrower in the hands of the assignor (Appellant) could not qualify for insurance in view of the express requirement of the controlling regulation (24 C. F. R. 201.3(a)), as quoted above. To argue now, in the teeth of the findings and conclusions reached by the trial judge, that he treated the transaction as an ordinary assignment is very close to frivolity. But even if he had failed to consider or understand the insurance aspects of the transaction, his ultimate conclusion that the "note" did not qualify for insurance is clearly correct on the record and so would require the affirmance of this court.

E.

The Trial Court Could Properly Refuse to Litigate the Issues Actually Decided in *United States v. Bashore* Because of Privity or a Similar Relationship Between Appellant and Appellee.

It is conceded that the appellant was not made a party to the action in *United States v. Bashore*, No. 19527-WM Civil, and is not a party to the judgment therein, as found by the trial court [R. 32]. Appellee agrees that Appellant is not bound by the judgment in said action under the doctrine of *res judicata*, that is, is not precluded from litigating issues which might have been raised and decided in said previous action but were not.

However, without regard to the Stipulation of Facts executed by the parties to this appeal and without regard to the doctrine of comity between judges of the same court, both of which have been discussed above, it is submitted that with respect to *United States v. Bashore* the Appellant was in privity with the Appellee and is, therefore, precluded from litigating herein the same issues actually heard and decided in that action.

The findings of fact in *United States v. Bashore* were essentially as follows:

1. That the purported "promissory note" was void because of fraud in the factum, especially since the maker "did not know or ascertain until long after the event that he had signed the instrument in suit or any other document negotiable in form" [R. 19];

2. That since the Appellant supplied the payee with its "own printed forms . . . for use in the transaction involved," it was charged with knowledge that the transaction was subject to the regulations of the Federal Hous-

ing Administrator and therefore took the purported promissory note “with knowledge of the defects therein and did not therefore become a holder in due course” [R. 20];

3. That the relationship between the payee and the Appellant as to the entire transaction was such that the Appellant must be considered in effect a party to the original transaction between the named payee and the maker of the “note” [R. 20].

The conclusions of law in said case were essentially as follows:

1. That the maker of the “note” (George D. Bashore) was not guilty of negligence in executing it or the related documents [R. 21];
2. That the Appellant did not become a holder in due course of said “note” [R. 21] but discounted it “with knowledge that said note was void and unenforceable” [R. 22].

It is submitted that the Appellant is estopped from challenging any of the foregoing findings of fact or conclusions of law as rendered in *United States v. Bashore*, at least since it had knowledge of said action previous to trial, as found by the trial court herein [R. 33] and did not deny that its counsel was in attendance during the trial. Although said Stipulation of Facts did not cover the latter question, the Appellee averred in its trial Memorandum of Points and Authorities that the Appellant not only knew of said action but that its counsel was present at the trial. Neither contention has ever been denied by the Appellant and presumably for this reason the trial court found that Appellant was informed of said action prior to trial [R. 33]. Although this falls short of finding that Appellant’s counsel actually attended the

trial, as further contended by the Appellee and as still undenied by Appellant, it is sufficient to bring this case within the scope of those more restrictive decisions relative to collateral estoppel which require knowledge of the previous action and an opportunity to participate therein.

Exclusive of agency situations—such as where the assignee has been made such in order to bring an action for the assignor—it would be difficult to find a case which provides a more reasonable basis for applying the doctrine of collateral estoppel than the case at bar. Here the parties, by virtue of the same instrument, were related not only as assignor and assignee but as insured and insurer and warrantor and warrantee. This multiple relationship created such a bundle of intertwining rights and obligations that the parties concerned must be deemed in privity with respect to any legal action for the enforcement of said instrument. The Supreme Court of the United States has held that a “right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties *or their privies, even if the second suit is for a different cause of action.* so long as the judgment in the first suit remains unmodified.” (Emphasis supplied.)

So. Pac. RR. Co. v. United States (1897), 168 U. S. 1, 48-49, 18 S. Ct. 18; quoted with approval in *Driggers v. Business Men's Assurance Co. of Canada* (5 Cir., 1955), 219 F. 2d 292.

Similarly, the Supreme Court of the United States has said:

“Estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases but exists, even although there be different

demands, when the question upon which recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.”

New Orleans v. Citizens' Bank (1897), 167 U. S. 371, 396.

It is clear that in the instant case, the circumstances and conditions surrounding the execution, endorsement, and assignment of the purported promissory note were identical to those present in *United States v. Bashore*. Indeed, both parties recognized such identity by stipulating to the basic facts found in the previous action. The question whether the “note” at issue qualified for insurance under the regulations depends upon the facts surrounding its execution and subsequent transfers. Therefore, those facts which were the foundation for the judgment in *United States v. Bashore* are necessarily basic to the instant suit also.

Where the parties are in such a close legal relationship and where the same transaction is involved, all of the conditions necessary for the proper application of the principles of privity and collateral estoppel are present, even under a strict interpretation.

Cases involving the doctrine of *res judicata*, as cited by the Appellant, are not germane. Since the instant case differs from *United States v. Bashore* not only with respect to the cause of action but with respect to the parties in suit, Appellee does not contend that the Appellant is bound by the doctrine of *res judicata*, that is, is barred by the judgment in said suit, and has at no time sought to invoke that doctrine. Appellee concedes that where a former judgment is relied upon as an absolute bar, there must be, as between the two actions, an iden-

tity of parties, of subject matter, and of cause of action. There is, however, a clearly-defined distinction between that type of case and one wherein some controlling fact has been adjudicated in a prior proceeding by a court of competent jurisdiction and that same fact is now at issue between the same parties or their privies. In the latter case, the adjudication of said fact in the first suit will be conclusive, irrespective of whether the cause of action is the same.

Leopold v. City of Chicago (1894), 150 Ill. 568,
37 N. E. 892, 893-894.

It is of decisive significance that the defense in *United States v. Bashore* was primarily based upon the fact that the "note" was obtained by fraud and that the defendant therein did not know he had executed an instrument which purported to be a note. It has been held by the Supreme Court of Illinois that if an instrument has been forged, or is usurious, or subject to other defects rendering it worthless, and if the endorser has been notified of such defense in an action to enforce the obligation, he will be bound by a judgment against the party whom he is obliged to indemnify.

Drennan v. Bunn (1888), 124 Ill. 175, 16 N. E.
100.

See also:

Oulvey v. Converse (1927), 326 Ill. 226, 157 N.
E. 245, 247.

The same court has held that the endorser of a forged or usurious note is a person having a direct interest in an action on that note.

Butz v. Schwartz (1890), 135 Ill. 180, 25 N. E.
1007.

The situation here is certainly analogous.

It has also been held that where an endorsee or holder of a note is defeated in an action against the maker and then sues his endorser or assignor, the latter is bound if he had notice of the prior suit and an opportunity to participate in it.

Bullock v. Winter (1851), 10 Ga. 214.

See also:

Oulvey v. Converse (1927), 326 Ill. 226, 157 N. E. 245; 34 C. J. p. 1025, note 84 and cases cited.

Similarly, it has been decided that a judgment on the merits in favor of the maker of a note, in an action against him by the holder, whether as payee or endorsee, is conclusive in favor of the maker in a subsequent suit against him by another plaintiff, whether as payee or endorsee.

Illinois Conference v. Plagge (1898), 177 Ill. 431, 53 N. E. 76.

Another case in point is that of *Norfolk Packing Co. v. American Insurance Co. of Newark* (1930), 120 Neb. 19, 231 N. W. 148, wherein it was held that a final judgment holding another insurance policy did not cover the property damaged was “res judicata” of the right of the defendant-insurer to prorate the loss under a tornado policy on the ground that additional insurance existed. It should be noted that the prior action pertained to a different company, that said defendant-insurer had not been a party thereto, and that the only element of privity, apparently, was that both companies had insured the same property and the same factual issue was involved.

Moreover, modern cases have shown an increasing tendency to expand the doctrine of collateral estoppel and to depart from narrow concepts of “privity” when necessary

to prevent the relitigation of identical issues. In *Vasu v. Kohlers* (1945), 145 Ohio St. 321, 61 N. E. 2d 707, the Supreme Court of Ohio held that an automobile owner, who had assigned to his insurer the claim for property damage arising out of a collision, was bound by the judgment rendered against the insurer, in its action against a negligent third party, to the extent of the assigned claim. Although it appears that the result reached may have been influenced to some extent by provisions of the General Code of Ohio (Secs. 11241 and 11306) the language of the court indicates that it considered its decision in accord with common-law principles. It conceded that a grantor or assignor was not bound, as to third parties, by any judgment which a third person obtained against the assignee with respect to the interest transferred unless made a party to the action or unless related otherwise to such an extent as to be in privity. Recognizing this as a general rule, the court nevertheless said that if the owner of a single cause of action arising out of a single tortious act assigns a part thereof to another, a recovery or failure to recover by such other, as assignee, on the assigned claim should extinguish the cause of action and bar any further prosecution of it by the assignor against the tort-feasor,

61 N. E. 2d 711, citing *Sprague v. Adams* (1926), 139 Wash. 510, 247 Pac. 960.

This follows, continued the court, not because of any privity between the assignor and assignee, but because there cannot be a splitting of a single, indivisible cause of action. It concluded that the success or failure of *either the assignor or assignee* in the prosecution of their respective claims against the tort-feasor extinguishes the entire cause of action.

61 N. E. 2d 711.

It is submitted that the foregoing analysis makes good sense and that good sense usually makes good law. It is also submitted that the rationale of *Vasu v. Kohlers*, would bar the relitigation of the enforceability of the note in the instant case.

Another case which departs from the traditional confines of privity in order to achieve the desirable result of preventing the duplicative litigation of identical issues is *Jenkins v. Atlantic Coast Line Ry. Co.* (1911), 89 S. Car. 408, 71 S. E. 1010. There it was decided that since the owner of a railroad is liable for injuries caused by those allowed to use it, a railroad which leased to another was in such a close legal relationship to the lessee that where a third party sued the lessor for injuries and lost, the judgment operated to bar a subsequent suit against the lessee.

71 S. E. 1012.

The court stated that the basis for its decision could not be rested upon the doctrine of *res judicata* or collateral estoppel because the parties to the suits were not the same and because they were not technically in privity. However, it said that in cases of this kind the principle of estoppel should be expanded on the ground of public policy, so as to embrace persons not strictly parties or privities. It is a wholesome principle, argued the court, that any litigant should have one fair opportunity to try his case upon the merits, but only one such opportunity.

71 S. E. 1012.

Accord:

Eagle Star and British Dominions Insurance Co. v. Heller (1927), 149 Va. 82, 140 S. E. 314.

See also:

State Farm Mutual Auto Insurance Co. v. Wright (1939), 173 Va. 261, 3 S. E. 2d 187.

Concededly, the *Jenkins* case is distinguishable in that there the party *against* whom the doctrine of estoppel was invoked had appeared in both actions, whereas here the party who appeared in both actions, that is, the Appellee, is seeking to invoke the doctrine against a third party, the Appellant. However, the reasons which underlie the *Jenkins* rule apply just as strongly to the instant case since Appellant had been fully informed of the prior action, had a fair opportunity to participate therein, and had, in fact, been present at the trial. Moreover, in both the *Norfolk Packing Co.* case and that of *Vasu v. Kohlers*, *supra*, the party estopped had not appeared in the previous action.

Furthermore, the parties herein voluntarily stipulated to the same basic facts found in *United States v. Bashore*. Therefore, the trial judge held, in effect, that under identical facts he was obligated to follow the previous conclusion of a judge of the same court that the "note" was not valid and enforceable against the borrower. We submit that this principle of comity between fellow judges is sound and should be approved, as to which see our discussion and citations above. But we also submit that, regardless of comity, the same result would be required by the proper application of collateral estoppel.

The decision of the Seventh Circuit Court of Appeals in *Le Duc v. Normal Park Presbyterian Church* (7 Cir., 1944), 142 F. 2d 105, cert. den. 323 U. S. 729, is of some relevancy. There it was held that a judgment for the defendant by a state court in an action between the plaintiff's assignee and the defendant created an estoppel by verdict as between the plaintiff and the defendant. The court stated that privity existed between the plaintiff and his assignee and that such privity created an effective estoppel. Although this result was reached under Illi-

nois law, which is liberal in its doctrine of privity, it may be inferred from the language of the decision that the Circuit Court also approved in principle.

The proper approach to the question presented here was well stated by the Supreme Court of Delaware in *Coca-Cola Co. v. Pepsi-Cola Co.* (1934), 6 W. H. Del. 124, 172 Atl. 260, as follows:

“The question of who is concluded by a judgment has been obscured by use of the words ‘privity’ and ‘privities,’ which are scarcely determinative always of who is or who is not bound by a judgment. Courts have striven sometimes to give effect to the general doctrine that a judgment is only binding between parties and privities by extending the signification of the word ‘privities’ to include relationships not originally embraced in it, whereas the true reason for holding an issue is *res judicata* does not necessarily depend on privity but on the policy of the law to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy.”

172 Atl. 263.

Accord:

Taylor v. Sartorius (1908), 130 M. A. 23, 108 S. W. 1089, 1094;

Hoskins v. Hotel Randolph Co. (1926), 203 Iowa 1152, 211 N. W. 423, cert. den., *Otis Elevator Co. v. Hoskins*, 275 U. S. 566;

Hochster v. City Bank Farmers Trust Co. (1942), 24 N. Y. S. 2d 110, 260 App. Div. 712, aff. 288 N. Y. 588, 42 N. E. 2d 600.

With respect to California cases which have similarly expanded the doctrine of privity, and which may be regarded as precedents for its application here, see *Bernhard v. Bank of America* (1942), 19 Cal. 2d 807, 122 P. 2d 892, and *Perkins v. Benguet Consolidated Mining Co.* (1942), 55 Cal. App. 2d 720, 132 P. 2d 70, hearing denied, California Supreme Court, 1943. Said cases are well digested in 57 Harv. L. Rev. 98-99, under the comment that "the fact that a judgment frequently has a conclusive effect upon those who are neither parties to the action nor privies, as that word is commonly used, is illustrated by two recent California cases."

We doubt that the Appellant would seriously argue that it would not be estopped in a suit against Bashore. If, then, Appellant would be so bound by the issues decided in said prior action although not a party thereto, why should it not be bound by the same issues herein? It is evident that to hold that the Appellant is estopped by the findings in *United States v. Bashore* from relitigating the enforceability of the note would not go nearly so far as several of the decisions cited above.

It is submitted that the multiple relationship between the parties to this action (insured to insurer, endorser to endorsee, warrantor to warrantee) created a close bond of privity, no matter how strictly that term is defined. It follows, then, that the only issue which Appellant is entitled to litigate in this action is the insurability of a "note" which was void and unenforceable against its maker.

F.

The Trial Court Was Clearly Correct in Deciding That the “Note” in Question, Having Been Found Invalid and Unenforceable Against the Borrower, Did Not Qualify for Insurance and, Therefore, That the Appellant Breached Its Warranty to the Appellee.

This argument presupposes that the note must be found unenforceable against the borrower, for reasons given above.

The National Housing Act, 12 U. S. C. 1701, *et seq.*, authorizes the Commissioner to insure

“banks . . . and other such financial institutions . . . against losses . . . as a result of loans and advances of credit, and purchases of *obligations* representing loans and advances of credit, . . . for the purpose of financing additions, repairs, and improvements upon or in connection with existing structures . . . by the owner thereof . . .” (Emphasis supplied; 28 U. S. C. 1703(a)).

The Act further provides:

“(b) No insurance shall be granted under this section to any such financial institution with respect to any *obligation* representing any such loan . . . (1) if the amount of such loan . . . exceeds \$2,000 . . . (2) if such *obligation* has a maturity in excess of three years and 32 days . . . or (3) unless the *obligation* bears such interest, has such maturity, . . . as the Commissioner shall prescribe . . .” (Emphasis supplied; 28 U. S. C. 1703(d)).

Finally, under Section 1703(g) of said Act, the Commissioner “is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter.”

The foregoing provisions show that the type of transaction contemplated is one whereunder the financial institution extends credit to the contractor-payee and takes an endorsement of the owner-payor's promissory note or other evidence of indebtedness. It is equally as clear that the Act itself contemplates the creation of an instrument which is valid and enforceable against its maker, at least in the hands of a lender who takes it in good faith, since it contains such phraseology as "purchases of obligations," and "unless the obligation." Of course, an instrument which is invalid *ab initio* because of fraud cannot create any obligation against its maker, no matter how innocent the endorsee may be.

Therefore, apart from any implementing regulations by the Commissioner, the National Housing Act itself requires that the note here in question must have been an obligation of the borrower when received by the Appellant in order to qualify for insurance. Any regulation to the contrary would be invalid.

The regulations, moreover, fully support and implement the foregoing requirement. The decisive provision is found in 24 C. F. R. 201.3(a), entitled "Eligible Notes—Validity" which, *inter alia*, provides: "The note shall bear the genuine signature of the borrower as maker, shall be valid and enforceable against the borrower or borrowers as defined in Section 201.2(i), and shall be complete and regular on its face." Section 201.2(i), which defines the term "borrower" is of little importance but is discussed below in reply to a contention by the Appellant.

The nub of Appellant's argument is that since the "note" in question was "complete and regular on its face" (which is conceded) and since Appellant purchased it in good faith (which is contrary to the finding in *United*

States v. Bashore, a finding impliedly adopted by the trial court here), it falls within the insurance coverage provided by the law. In effect, the Appellant contends that the Act and the regulations thereunder are in derogation of the ancient common-law principle that a contractual instrument so saturated with fraud that the maker did not know its meaning or purpose is a legal nullity. Such an instrument, if it purports to be a promissory note, creates no "obligation" against its maker in favor of anyone, as explained above, and thus cannot transmit any rights to any endorsee, no matter how innocent.

The interpretation sought by Appellant finds no support in the Act or regulations. On the contrary, it distorts the plain meaning of the language used and violates several canons of statutory construction.

What Appellant seeks to do is to equate the requirement that the note "be valid and enforceable against the borrower" with the requirement that it must be "complete and regular on its face," despite the fact that they are contiguous and are coupled by the conjunction "and" rather than the disjunctive "or."

Appellant's argument, lacking support in the context of the Act, in its legislative history and purpose, and in the administrative regulations thereunder, would be weak even if the disjunctive had been used; but faced with "and" instead of "or" it is completely untenable. Therefore, since a purported note which is void for fraud is not enforceable against the payor by anyone, no matter how aptly drafted and no matter what technically correct attachments are executed by payor or payee, the instrument in suit did not qualify for insurance.

There is nothing in other regulations which fortifies the Appellant's argument in any way. On the contrary, they strengthen the position of the Appellee.

For example, 24 C. F. R. 201.11 entitled “Claims-(a) Claim Application” states:

“Claim for reimbursement for *loss on an eligible loan* shall be made on a form provided by the Commissioner, and executed by a duly qualified officer of the insured. *The claim shall be accompanied by the insured’s complete credit and collection file pertaining to the transaction.*” (Emphasis supplied.)

Presumably, the requirement that the credit and collection file of the insured be “complete” is designed, in part, to test the conduct of the payee and the insured during the transaction.

Finally, 24 C. F. R. 202.11(g) entitled “Form of Assignment” provides that the instrument of assignment shall be in the following form:

“All right, title and interest of the undersigned is hereby assigned (without warranty, *except that the note qualifies for insurance*) to United States of America.

(Financial Institution)”
(Emphasis supplied.)

It is submitted that the foregoing provisions of the Act and the regulations thereunder compel a conclusion that to qualify for insurance a purported note must create an obligation against its maker which is enforceable by the insured.

Other arguments advanced by Appellant is an attempt to support its distorted interpretation of the Act and its regulations are equally fallacious.

For example, on page 13 of its brief, it states:

“It will be found that the intent of the whole system and regulatory measures is to protect the lending

institution and afford it the insurance when such lending institution acts in good faith in reliance upon the Act and otherwise complies with the regulatory measures prescribed therein.”

Of course, since the question in issue is whether Appellant had complied “with the regulatory measures prescribed therein;” this sort of argument—which abounds in Appellant’s brief—begs the basic issue. Moreover, if the Appellant means to contend that the primary purpose of the regulations is to “protect the lending institution,” it is clearly incorrect since even a cursory reading reveals that the main objective is to assist and protect the borrower and that the inducements offered the lending institutions are in furtherance of this purpose. The Appellant has conveniently overlooked the primacy of the borrower in the “Title I” program and the desire of Congress to avoid any regulatory system which would encourage the commission of frauds by unscrupulous contractors or laxity in investigation and supervision by the banks.

Indeed, the Appellant refutes its own argument on this point by a subsequent quotation which appears on page 9 of its brief. The pertinent part of this quotation (which is taken from page one of a guide to the regulations issued by the Commissioner, entitled “Title One, National Housing Act, Its Regulations, Its Declared Administrative Policy—Summary of Pertinent Provisions” but more commonly known as “FHA-20”) is as follows:

“The operation of the Title One program is based on the *good faith of all concerned*—the good faith on the part of the individual borrower who applies for and receives a loan, the *good faith of the dealer or contractor* carrying out the terms of this contract and rendering proper service to the customer, the *good faith of financial institutions*. . . .” (Emphasis supplied.)

Clearly, then, the good faith of the contractor and the good faith of the lending institution are important. It is certainly in harmony with the Title I insurance system to rule that where the contractor's fraud surrounded the execution of the "note" to such an extent that the borrower did not realize he was signing a note, such a transaction is wholly outside the coverage of the Act and that any bank which participates in it, even in good faith, must bear the risk involved.

On page 9 of its brief, the Appellant quotes from page 3 of said guide to the regulations "FHA-20," as follows:

"If default occurs and claim for reimbursement for loss is made by the lending institution, the claim will be paid upon proper audit and findings that the *loan was handled in accordance with the regulations.*" (Emphasis provided by Appellant.)

Here again we have an obvious instance of begging the question. The Appellee, of course, contends that this loan was *not* handled in accordance with the regulations and thus did not qualify for insurance. Consequently, such quotations as the foregoing are meaningless.

Page 10 of Appellant's brief bears the following quotation from page 4 of said "FHA-20:"

"Where reasonable credit judgment is exercised and the institution makes a fair volume of loans, the insurance coverage afforded is virtually 100 per cent guarantee against loss." (Emphasis supplied.)

Apparently, Appellant believes this quotation indicates that the regulations are designed to afford the banks almost absolute protection. However, the quotation carries its own refutation of that argument, since the clause "where reasonable credit judgment is exercised" obviously applies to the factor of collectibility, so that this language merely

means that where the procedure prescribed by the regulations was followed and the bank exercised "reasonable credit judgment," defaults will be rare and any losses therefrom will be covered by the statutory insurance.

Again, on page 11 of its brief, Appellant quotes the following from 24 C. F. R. 201.6(b):

"If, after the loan is made, an insured who acted in good faith discovers any *material misstatement or misuse of the proceeds* of the loan by the borrower, the dealer, or others, the *eligibility of the note for insurance shall not be affected.*" (Emphasis by Appellant.)

This merely gives express recognition to the principles governing a holding in due course, such as where the contractor has committed "fraud in the inducement" by misrepresenting his materiel or services or has subsequently failed to keep his promises. Such fraud or breach of contract would not impair the negotiability of the note in the hands of a holder in due course, under familiar principles of commercial law. But there is nothing in this language which indicates that an instrument which a non-negligent maker did not know was a "note" may be regarded as obligating him to anyone.

Moreover, throughout its brief the Appellant assumes that it must be found to have acted in good faith in taking the note in question. No such finding, however, can be made. As indicated above, the Appellant voluntarily executed a Stipulation of Facts, which incorporated by reference the judgment in *United States v. Bashore, supra*. Said judgment included specific findings of fact to the effect that the Appellant was chargeable with knowledge of the infirmities in the instrument because it had given its forms to the contractor and had taken part in the

transaction to such an extent that it virtually made the latter its agent [R. 20]. Although Appellant disputed those findings in its trial briefs, it submitted no proof to the contrary, despite the fact that Appellee's complaint herein incorporated them specifically [R. 6, 13]. Indeed, except by a rather flimsy inference, it did not deny said findings in its answer [R. 10]. Since, therefore, Appellant failed to offer any evidence that a previous finding by a judge of the same court on the same issue was erroneous, it lacks any standing to protest against the application of judicial comity, as discussed above. Moreover, it is also bound by these findings under principles of collateral estoppel, as discussed above. Finally, if it be assumed, *arguendo*, that the affirmative defense of holding in due course is open to Appellant, it would have the burden of proof thereon and, quite apart from principles of comity or estoppel, it must fail on this issue because it offered no proof at the trial.

Consequently, on the question of whether Appellant was a holder in due course, this appeal reaches the court in this posture, that Appellant, if not bound by the previous finding in *United States v. Bashore* that it did not act in good faith, at least has not proven its good faith herein and so must be regarded as having taken the "note" subject to all valid defenses of the maker against the payee.

On page 14 of its brief Appellant, in order to support its argument that the words "valid and enforceable against the borrower" mean the same as "complete and regular on its face," is driven to the extreme of rewriting the controlling regulation (24 C. F. R. 201.3(a)). No doubt, the language and punctuation used by the Appellant would support its theory. The fatal flaw in this strange argument is that Appellant's literary creation, although proof of a vivid imagination, can in no sense be regarded as a

fair paraphrase of the regulation but is a substantially different provision, bearing no resemblance to the actual one with respect to the decisive phraseology. An attempt to equate the authentic words “shall be valid and enforceable against the borrower . . . , *and* shall be complete and regular on its face” (emphasis supplied) with the words “shall, on its face, appear to be complete and regular, valid and enforceable against the borrower . . .” (Appellant’s creation) is so patently indefensible as to require no further comment. We are not concerned with the kind of regulation which the Commissioner *might* have adopted but only with the actual language used and the meaning of that language.

On pages 12 and 13 of its brief the Appellant quotes from 24 C. F. R. 201.1(i) with respect to the definition of “borrower” as follows: “One who applies for and receives a loan in reliance upon the provisions of the Act . . .” and then proceeds to argue that the “reliance” referred to is that of the lender and not the borrower. This has some merit since it seems logical to conclude that the borrower is interested in utilizing the Act merely to obtain a loan under moderate terms and, having obtained it, does not look to the Act for future benefits or protection. It is probable that after the loan is made and its terms defined most borrowers have little interest in the insurance system created by Title I and in the regulations which implement it. However, Appellant’s play on words fails to fortify its theory. The “reliance” mentioned is that “upon the provisions of the Act,” which, of course, incorporates the regulations thereunder. Therefore, once again the Appellant begs the basic question. Certainly, it was entitled to rely “upon the provisions of the Act” but the sixty-four-dollar question is what those provisions mean with respect to the issues presented by this appeal.

The answer to the foregoing question must be found by analyzing the entire context of the Act and its regulations, with due regard for their objectives as revealed by the language used and by their legislative and administrative history. While unnecessary to the determination of this appeal, it is submitted that the protection afforded the lending institution is essentially against the risk of collection rather than negotiability, that with respect to the latter the lender, if it acts in good faith, receives the same protection as any holder in due course under general commercial law, no more and no less. The primary purpose of those portions of the Federal Housing Act involved herein is to encourage home repairs and improvements by providing loans on terms favorable to the borrowers. Since Congress knew that many lending institutions normally would avoid such loans because of the rather high risk of default and collection involved, it undertook to insure lenders against this risk. But it did not also undertake to rewrite the law of negotiable instruments in their favor.

G.

The Appellee Is Not Prejudiced Because It May Have Voluntarily Indemnified the Appellant Under a Mistake of Law.

Although Appellant did not expressly contend in the trial court that the Appellee may not recover because it indemnified the Appellant after knowing, or being chargeable with knowledge, of the payor's grievances, it impliedly advanced such an argument by stating that the Appellee had been informed of such grievances but had paid the balance due on the "note" nevertheless, and, therefore, had not been misled. The trial judge, in effect, so found [R. 20-21, Finding XI].

If it be conceded, *arguendo*, that having such knowledge the Appellee should not have indemnified the Appellant voluntarily, it is not prejudiced by its error in having done so. This court has recently ruled that a voluntary payment by the United States under a mistake of law may be recovered.

Kingman Water Co. v. United States (9 Cir., 1958), 253 F. 2d 588, 590.

In the *Kingman* decision this court said:

“The third argument is that money voluntarily paid over under mistake of law is not recoverable. A case or two to that effect is cited. However, the rule apparently does not apply to the Government. See *Brooklyn & Richmond Ferry Co. v. United States*, 2 Cir., 167 F. 2d 330. The Supreme Court in *United States v. Wurts*, 303 U. S. 414, 58 S. Ct. 637, 638, 82 L. Ed. 932, states:

“The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid * * * The Government’s right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has “clearly manifested its intention” to raise a statutory barrier.’”

Since the Federal Housing Act manifests no intent by Congress to estop the United States from recovering money erroneously paid under the facts here present, the Government’s error is immaterial.

VI.
CONCLUSION.

In view of the foregoing principles and precedents, it is respectfully submitted that the judgment of the trial court herein should be affirmed.

DATED: This 24th day of April, 1959.

Respectfully submitted,

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No. 16285

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

1. While the monetary amount of the judgment from which this appeal is taken is small, the issues involved are serious and their determination is of great importance to Appellant as a bank participating substantially in the FHA Title I program. It therefore seems entirely out of place for Appellee, as it does in the outset of its brief, to detract from a proper determination of these issues by indulging in an abortive and spurious argument by which it attempts to have included in the Stipulation of Facts joined in by the parties [R. 14], matters which were not therein agreed to by the parties. Appellee attempts to read into paragraph 3 of the Stipulation of Facts, an adoption or virtually an acquiescence to the "basic" facts found by Judge Mathes in Appellee's case against Bashore, the maker of the note here concerned (*United States v. Bashore*, No. 19527-WM Civil). Paragraph 3 of the stipulation provides

in effect that the parties agree as a *fact* that, following the transfer of the note in question by Appellant to Appellee, Appellee filed an action against the maker Bashore to collect the balance due; that as a *fact* it was adjudged in said action that Appellee take nothing against the maker Bashore on its complaint; that as a *fact* the Judgment made and given in said action was, as per a copy of same which is attached to the Stipulation, marked Exhibit "A" and by reference made a part of same. It is to be noted that the trial court in the case at bar, and to whom the Stipulation of Facts was submitted, gave no such construction to same as is now attempted by Appellee.

The object of this part of the Stipulation is quite clear, namely: that instead of requiring the Appellee to introduce the original Judgment from the court file in the trial court proceedings, the parties agreed to the *fact* that such a judgment was made; that instead of reciting the Judgment *haec verba* in the body of the Stipulation, a copy thereof was attached to it by reference and made a part of it, and as if it had been so recited *haec verba* in the body thereof.

2. Throughout its brief, Appellee indulges in certain misstatements, tending further to detract from a proper determination of the issues herein involved, concerning the findings of Judge Mathes in the case of *United States v. Bashore*, and its argument proceeds throughout its brief on a false premise arising out of these misstatements.

The false premise and misstatements referred to are: (a) wherein Appellee incorrectly avers that in its action on the note against Bashore, Judge Mathes, who heard that case, had found that Bashore "did not know" that he was signing a "note"; (b) that Judge Mathes found there was fraud in the *factum*.

In no part of Judge Mathes' Findings of Fact is there such a finding that Bashore "did not know" he was signing a "note". Judge Mathes certainly could not very well have made a finding that Bashore did not know that he had signed a note or some instrument evidencing an obligation to pay money, when the Court had before it evidence that Bashore had made 18 *monthly payments on the note to the assignee bank* before he defaulted [R. 15].

On the contrary, the Findings of Judge Mathes are that the defendant Bashore did execute and sign the promissory note in question, but he did not know until long after he had signed it that it was *negotiable in form* [R. 18-19]. Judge Mathes' findings emphasized his conclusion of the non-negotiable character of the note and of fraud *in the inducement*, finding in substance that agents of the payee, Durastone Company, misrepresented "basic" facts and Bashore was informed and believed that certain mastic paint would be applied to his home—free of charge; that the consideration (meaning the entire consideration) promised to Bashore by Durastone Company had not been received by him and, inferentially, had it so been received by Bashore, it would have off-set his obligation on the note, with the end result that the application of the mastic paint to his home would have been "free of charge". Judge Mathes further found that as the appellant bank had supplied the payee dealer with printed forms of promissory notes and FHA Title I credit applications for use in the transaction involved, the note was therefore non-negotiable and the bank was therefore charged with constructive knowledge of the failure on the part of the payee dealer to fulfill the consideration promised to Bashore, which, had it been fulfilled, would have resulted in the improvement to his property costing him nothing.

3. Commencing on page 3 of its Brief, Appellee sets forth certain Regulations referred to as the Regulations "involved", but pointedly omits any reference to Regulations 201.6(b), 201.9(2), 201.7 and 201.8(b), 24 C. F. R. These Regulations are not to be ignored. Appellee cannot, in the face of these Regulations, cast itself in the role of an assignee of an ordinary promissory note. The Regulations provide for a Completion Certificate to be signed by the borrower (201.9(2), 24 C. F. R.) wherein, among other things, the borrower is admonished not to sign the Certificate until *he is satisfied that the dealer has carried out his obligations to him*. Thus, it is submitted, the borrower's signing of the Completion Certificate is tantamount to his *statement* that the dealer has carried out his obligations. The dealer is also required to sign the Completion Certificate wherein he states that the work or materials referred to therein CONSTITUTE THE ENTIRE CONSIDERATION for which the loan is made.

The insured lending institution, *acting in good faith*, is nevertheless covered by the insurance even though it be afterward discovered that there were material misstatements or misuse of the proceeds of the loan by the borrower or the dealer (24 C. F. R. 201.6(b)). Likewise the insured lending institution, acting in good faith, may, in the absence of information to the contrary, rely upon all statements of fact made by the borrower which are called for by the borrower's credit application, in determining the eligibility of the improvements to the property (24 C. F. R. 201.7).

In the case of *United States v. Bashore*, besides the fact that the insured lending institution (Appellant) was not a party to the action, the issue of good faith of Appellant as the insured lending institution and in respect to insura-

bility, was not involved. No finding of a lack of good faith of appellant bank was made by Judge Mathes—only a Finding and Conclusion of non-negotiability of the note because the appellant bank had supplied the dealer with the FHA Forms, in pursuance to the mandates of the Regulations; that having found the note to be non-negotiable, Judge Mathes concluded that the insured bank (Appellant) was not a holder of the note in due course and was therefore charged with *constructive notice* of the irregularities in the conduct of the dealer, the payee Durastone, which he found.

4. Throughout its brief, Appellee persists in its view that it is an assignee of an ordinary promissory note, and insists that the note, in order to qualify for insurance, *must* have the quality of a negotiable instrument; that the insured lending institution *must* be a holder in due course.

In no part of the Regulations will it be found that, as a prerequisite for insurability, the notes must have the quality of negotiable instruments, and that the lending institution must acquire the notes as a holder in due course.

Particular reference is respectfully made to the general Administrative Policy as declared by the Administrator in his published guide distributed to lending institutions (FH 20), and which was applicable to the transaction here involved. At page 17 thereof and under the title of "Dealer Relationship", the Administrator advocates a close association between the borrower, the dealer and the lender as follows:

"The closer the association between the borrower, the dealer and the lender, the less likelihood there is of credit misrepresentation, misapplication of funds, over-selling or other abuses. Conversely, the more dis-

tant the working relationship becomes, the greater is the possibility of intentional or unintentional irregularities."

Close association of an assignor and assignee of a promissory note, otherwise negotiable in form, with the transaction leading to its issuance, can possibly destroy the status of the assignee as being a holder of the note in due course. See (*Commercial Credit Corp. v. Orange Co. Machine Works*, 34 Cal. 2d 766.)

If Judge Mathes' views are correct that FHA Title I notes are non-negotiable in this state because of the use of such FHA Title I Forms and the supplying of same by the lending institutions to the dealers concerned; and if the close association of the lending institution with the dealer as advocated by the Administrator as of itself tends to destroy negotiability of FHA Title I notes in this state; and, further, if Appellee's point of view is correct that FHA notes, in order to qualify for insurance *must* be negotiable and the lending institution *must* be a holder thereof in due course; then it can be said that the whole FHA Title I system collapses in California. If such be the case, lending institutions in this state which have heretofore relied upon the effectiveness of the insurance, could well have cause to make substantial claims for refund of premiums paid over the years for an insurance protection which was non-existent.

5. Reference is also respectfully made to the general Administrative Policy as declared by the Administrator in his aforementioned guide, FH 20, at page 22 thereof under the title of "Precautionary Measures", reading:

"Occasionally there are dealers or salesmen employed by them, who tend to abuse the privileges ac-

corded under the program. When such irregularities or disregard for the Statute and Regulations are brought to the attention of the Federal Housing Administration, lending institutions will be notified. When such notification is received from the Commissioner, or his authorized agent, the provisions of Regulation VIII, Section 2, will apply.”

Regulation VIII, Section 2 referred to (24 C. F. R., 201.8) reads:

“2. Precautionary measures.—If the insured has not approved the dealer, as provided in section 1(a) of this Regulation or has reason to withdraw such approval, the proceeds of a loan shall not be disbursed until:

(a) The insured has verified all statements contained on the Borrower’s Credit Application.

(b) The borrower has signed the Borrower’s Completion Certificate in the presence of the insured.

(c) The insured has inspected the work performed in every instance when the amount involved is \$500 or more, and in at least one out of every three transactions when the amounts involved are less than \$500.

(d) The insured has signed a statement to the effect that the above requirements were complied with prior to releasing the proceeds of any such loans. Such statement must accompany each Loan Report.”

The foregoing in effect provides for a situation where the Administrator imparts actual knowledge to the lending institution (the insured) of a course of rascality on the part of an identified dealer; but that nevertheless if the insured lending institution in dealing with such identified

dealer follows the mandate prescribed in Regulation VIII, Section 2 (24 C. F. R. 201.8), the benefits of insurance will nevertheless attach.

Certainly under such circumstances it would very likely be held that the lending institution, with such knowledge imparted to it by the Administrator, would not be a holder in due course. The obvious conclusion, then, is that in order for notes to be eligible for insurance, the quality of negotiability could not possibly be intended as a prerequisite under the FHA Act and Regulations.

6. Your brief writer respectfully submits for the consideration of this reviewing Court the propriety of it taking judicial notice of an opinion of the Federal Housing Administrator by and through the person of his Chief Counsel for Title I FHA Loans, namely: Warren Cox, Esq., in Washington, D. C., on the question of negotiability of FHA Title I notes, and which opinion is expressed by Mr. Cox in his letter written to your brief writer under date of August 12, 1957. Such an opinion is, in effect, a construction by the Administrator himself concerning his own Regulations. The letter of Mr. Cox was in response to one written by your brief writer, in which the judgment of Judge Mathes in *United States v. Bashore* was discussed. Mr. Cox writes in part:

“You appear concerned about the discussion of the Court in this case as to the non-negotiability of the note. In view of the decision of the Supreme Court of California in the case of *Commercial Credit Corp. v. Orange County Machine Works*, 34 Cal. (2d) 766 (1950), 214 F. (2d) 819, it would appear doubtful if a bank or finance company can ever be a holder in due course of paper of this kind in the State of California. Generally this is immaterial.”

The letter itself can be submitted to the Court at the time of oral argument if it please the Court to receive it.

7. Should some parts of Judge Mathes' findings appear to be ambiguous, Appellant submits that it will be of aid to this Court for it to take judicial notice of a partial transcript of the proceedings in the case of *United States v. Bashore* following close of the evidence and the Court's summation of that case, reading in part as follows (p. 3):

"The Court: Of course, the bank isn't charged with knowing. Even if the bank had known about it, the bank wouldn't have had any duty to do anything about it, would it? The most we can say, I take it, is that the bank might become a party to the transaction in the sense that it becomes incapable of becoming a holder in due course. The bank might, by providing these forms for use by the dealer, in effect constitute the dealer its agent to go out and drum up loans."

Addressing Mr. Robert M. Shafton, Assistant United States Attorney (p. 16):

"The Court: Yes. But the body of the note itself—

Mr. Shafton: That's correct.

The Court: —very carefully doesn't mention that this is an FHA Title I loan; yet we all know it is. And I would just doubt very much, even on that basis alone, in substance, that this is a negotiable instrument.

Mr. Shafton: Of course, what we are doing is saying that Congress, when it passed the National Housing Act and passed the regulations pursuant

thereto, did not intend that these promissory notes were to be handled under the Negotiable Instruments Law.

The Court: I think you put your finger right on it. And I doubt very much that it was ever intended.

Now, of course, these documents are skillfully drafted. They avoid any mention—except the Bank of America, I notice, calls it a ‘modernization note.’ They might just as well say, according to common understanding, that this is a Title I FHA note. Wouldn’t you say so?

Mr. Shafton: Very close to it.

The Court: But the Citizens Bank, as I recall, didn’t do that.

Mr. Shafton: It would seem, as I say, that a decision like this will certainly change considerably the way future FHA cases are handled, because it does reinterpret for the banks the law under which they are taking these notes.

I think in this particular case that if there were some actual knowledge that we could place upon the bank of any fraud in the transaction that that is one thing that I would have liked to have found here. If we could, I think the bank should be definitely held a party to the transaction.

The Court: Oh, the bank really doesn’t know anything about it at all, you know, I suppose, as a practical matter.

Mr. Shafton: I sincerely believe the Citizens Bank didn’t in this case.

The Court: No. And the bank may think that some of its customers are rascals, but it couldn't prove it. It wouldn't know it.

Mr. Shafton: That is the purpose of checking on the credit of the dealers, as well as checking on the credit of the customer, the borrower. And in some cases we have brought in the bank as a defendant because the bank clearly, through the acts of its agents, had knowledge of open fraud."

On page 18 of the transcript, the Court addressing Mr. Shafton:

"The Court: . . . I'll agree with you that Mr. Bashore was negligent here and that he is not entitled, under the circumstances here, to sign this and say he didn't know that he was signing a note. But the defenses that are available to him as against the named payee are, in my opinion, available to him as against the bank and as against the Government; and that under the circumstances here the bank must be held, in effect, to be a joint payee with the named payee and hence not a holder in due course."

8. The ultimate question to be decided in this case is: Was there any substantial evidence before Judge Westover which precluded the bank's right to insurance under *all* of the Regulations of the Administrator, and particularly Regulations 201.6(b), 201.7 and 201.8(b), 24 C. F. R.

The issues under these Regulations are simply these:

Did the bank act in good faith as provided in the pertinent regulations, and otherwise conform to same?

Assuming (but not conceding), that the doctrine of collateral estoppel does apply, the bank's status under such doctrine (as per the decision of Judge Mathes) is that it had *constructive* (not actual) notice of a side agreement between the dealer and the borrower, by reason of the use of FHA forms in accordance with the mandate of the Regulations, resulting in the dealer's agent being deemed by Judge Mathes to be the agent of the appellant bank.

Such a finding, while destroying negotiability, does not negate the good faith of the bank under the above Regulations, and its right to claim insurance. The bank could in good faith make a loan and have insurance notwithstanding actual notice of irregularities (which in the instant case it did not have).

Briefly stated, the mere holding in another action that the insured lender is not a holder in due course, does not necessarily decide that the note in question would not be eligible for the insurance. Further evidence expressly directed toward the good faith, actual knowledge and conduct of the lender under the foregoing Regulations, is indispensable to settle the issue of insurability. The burden was on the Appellee to plead and prove a case of uninsurability. It is respectfully submitted that it did neither of these things, and there was nothing before Judge Westover to justify the granting of the relief prayed for in the Appellee's complaint.

It is therefore respectfully submitted that the judgment herein appealed from should be reversed.

Dated: May 11, 1959.

Respectfully submitted,

HENRY MERTON,

Counsel for Appellant.

No. 16290 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMOS BLACK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

RONALD S. ROSEN,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

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PAUL P. O'BRIEN, CLERK



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No. 16290
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

AMOS BLACK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from an Order of the United States District Court for the Southern District of California denying the motion of appellant to vacate a prior sentence and judgment in case No. 26039-CD. On September 16, 1957, appellant was sentenced to two consecutive terms totaling thirty years for violations of Section 174, Title 21, United States Code.

The jurisdiction of the District Court is founded upon Section 3231, Title 18, United States Code. The petition to vacate the original judgment was made by appellant under Section 2255, Title 28, United States Code. The jurisdiction of the Court of Appeals to entertain this matter may be found under the provisions of Section 1291, Title 28, United States Code and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

Statement of the Case.

A complaint was filed against Amos Black on March 10, 1957, before United States Commissioner Theodore Hocke for violation of Title 21, United States Code, Section 174 [R. 6, Vol. I].* A warrant for Black's arrest issued by the Commissioner pursuant to the complaint was returned unexecuted as the petitioner was then in the custody of other authorities [R. 8 and 10, Vol. I]. Black and his co-defendant, Yvonne Shelton, were then indicted by the Federal Grand Jury on July 3, 1957, bond was fixed at \$20,000 for each defendant, and bench warrants were issued for the arrest of each defendant [R. 2-4, 13, Vol. I]. It is apparent that Black was still in the custody of the Los Angeles County Sheriff because on July 10, 1957, a Writ of Habeas Corpus was issued by the Honorable Peirson M. Hall, directing the Sheriff to produce Amos Black in the United States District Court for arraignment and plea [R. 10, 26, Vol. I]. The Writ was executed and Black was brought into the United States District Court, Southern District of California, Central Division on July 15, 1957, at which time and place he was arraigned and pleaded not guilty to all three counts of the indictment [R. 12, Vol. I; R. 4-5, Vol. II], and the matter was set for trial on August 13, 1957 [R. 6, Vol. II]. On July 30, 1957, Amos Black became a Federal prisoner when the bench warrant for his arrest, issued pursuant to the indictment, was executed by the United States Marshal [R. 13, Vol. I]. On August 9, 1957, Black's Motion to Produce Documents was denied by the Court after a careful consideration of the import of the then recent *Jencks* decision [R. 14-21, 31, Vol. I; R. 22-27, Vol. II]. On August 13, 1957, upon Motion of Welford Wilson, Black's

*The letter "R" refers to the Record on Appeal.

counsel, Dr. Victor Parkin was appointed by Judge Hall to conduct a psychiatric examination of the petitioner to determine if he was able to understand the proceedings against him and properly assist in his own defense [R. 32-33, 40, Vol. I; R. 31, Vol. II]. On August 15, 1957, the Court heard the testimony of Dr. Parkin and found the defendant Black competent to stand trial and properly assist in his own defense [R. 51-56, Vol. II]. On the preceding day, August 14, 1957, co-defendant Shelton pleaded guilty to a two count superseding information charging her with distribution of narcotics [R. 38-42, Vol. II]. She was sentenced to twenty years imprisonment on her plea of guilty on September 16, 1957 [R. 273, Vol. II].

The trial of Amos Black commenced on August 22, 1957, after a jury had been impanelled on August 20, 1957 [R. 67 and 72, Vol. II]. The trial continued on August 23, was resumed for further jury trial on August 27 on which date the jury found defendant Black guilty on all three counts of the indictment [R. 51-55, Vol. I; R. 72-264, Vol. II]. On September 16, 1957, Black was sentenced to fifteen years imprisonment on each count, the first two counts to be served concurrently and the sentence on Count Three to be served consecutively to Counts One and Two [R. 6, 62, Vol. I; R. 266-269, Vol. II].

It was shortly after sentence that Amos Black began writing numerous letters to various judges in the District Court and the Court of Appeals. In response to one of these letters [R. 64-65, Vol. I], the Court appointed James L. Garcia to represent Black [R. 71, Vol. I]. This Court denied Black leave to appeal *in forma pauperis* on November 12, 1957 [Undocketed, Misc. 696, see also R. 288, lines 14-19, Vol. II] and no appeal was ever taken

from the judgment of the Court below. The letters and motions continued to arrive, however, and their sheer volume [R. 72-73, 76-77, 78-81, Vol. I] and the statements made by the defendant in Court on May 5, 1958, prompted the Court below to order a hearing for Mr. Black under Title 28, United States Code, Section 2255, on June 9, 1958. The letters continued to arrive from Black [R. 86-87, 88-89, Vol. I]. The hearing under Section 2255 was continued to June 30, 1958, and the Government was ordered to furnish a copy of the trial transcript to Black [R. 90, Vol. I]. An Opposition to the petitioner's Motions was filed by the Government on June 25, 1958 [R. 91-97, Vol. I], and on June 30, July 2, July 8 and July 9, the petitioner argued his cause and the matter was submitted [R. 100-101, 117-118, Vol. I]. Interspersed between these hearings and continuing after their conclusion, a barrage of Motions, letters, and miscellaneous papers from the petitioner were filed in the Court below [R. 104-116, 119-131, 132-133, 134, 135-136, 138-139, 140-141, 143-144, 145-146, 147, Vol. I]. All these papers appeared to be further statements in support of the motion under Title 28, United States Code, Section 2255. Or perhaps they were all successive Section 2255 motions. It is difficult to tell. On September 23, 1958, Judge Hall denied Black's motion in a memorandum opinion [R. 148-153, Vol. I].

Piqued to new activity by the adverse decision of the Court below, Black filed a Notice of Appeal, an Opposition to Memorandum and Order, a Writ of Habeas Corpus, a Motion to be Released on his Own Recognizance, and a Motion to Produce Documents [R. 154-157, 172-174, Vol. I]. The latter two motions were denied by Judge Hall on December 4, 1958 [R. 183-184, Vol. I]. On the same date, Judge Hall ordered that the entire file be certified as the record on appeal [R. 194, Vol. I].

To this date the petitioner has elected not to commence service of his sentence and remains in the County Jail [R. 63, 64, Vol. I; see also Appendix to Appellee's Brief].

I.

There Was No Denial or Infringement on the Petitioner's Constitutional Rights so as to Render the Judgment Vulnerable to Collateral Attack.

A. Petitioner, as accurately as his brief can be interpreted, complains that he was denied his constitutional rights in that he was not arrested pursuant to a commissioner's warrant and immediately taken before a commissioner (App. Br. 3-5).^{*} The contention is without merit since the warrant was returned unexecuted because Black was then in State custody [R. 8, Vol. I]. In view of the fact there was no arrest, the provisions of Rule 5(a), Federal Rules of Criminal Procedure, Title 18, requiring the arresting officer to take the prisoner before a commissioner "without unnecessary delay," do not apply. If there were some irregularity in the arrest here, which there was not, questions regarding the propriety of arrests cannot be raised under the provisions of Title 28, United States Code, Section 2255, but rather must be raised by appeal.

Brule v. United States, 240 F. 2d 589 (9th Cir., 1957);

Lewis v. United States, 235 F. 2d 580, 581 (9th Cir., 1956).

See also:

Yodock v. United States, 97 Fed. Supp. 307, 310 (D. C. Pa., 1951).

^{*}This refers to appellant's brief.

B. Petitioner next complains that no bail was fixed in his case. This is, of course, not true. A bail of \$20,000 was set on the indictment on July 3, 1957, and a bench warrant issued thereon [R. 2-4, 13, Vol. I]. Appellant was then in State custody and was produced in court pursuant to a Writ of Habeas Corpus *ad Prosequendum* for arraignment and plea on July 15, 1957 [R. 10-11, Vol. I; R. 4-5, Vol. II]. The bench warrant was executed on July 30, 1957, at which time Black became a Federal prisoner.

C. There was no conspiracy to deprive Black of his rights, as he alleges on page 13 of his brief merely because different charges were filed against his co-defendant, Yvonne Shelton. She pleaded guilty to both counts of a superseding information and was sentenced to twenty years imprisonment [R. 38-42 273, Vol. II]. Nor was there any "deal" to deprive him of such rights. Co-defendant Shelton was not called as a government witness, nor did she testify at all at the trial of Amos Black.

D. Petitioner's allegation and attempts to show by extracts from the transcript that Agent Gilkey testified falsely are so confused and unintelligible as to almost preclude an answer. Perhaps Black's unfamiliarity with the law and all its subtleties has lead him to make allegations which a lawyer would not make. Perhaps one illustration will suffice to show his honest confusion undoubtedly provoked by the mysteries and intricacies of the law. On pages 19 and 20 of his brief he tries to show that Agent Gilkey contradicted himself when answering questions regarding the meaning of the term "old man."

"Q. What did he mean by my old man Billy?
A. I don't know what he meant." [R. 133, Vol. II.]

Petitioner points to the following colloquy on the following day to show alleged inconsistencies:

“By Mr. Wilson:

Q. Now, do you know in the language of the streets what the term ‘old man’ means? A. Yes I think so.

Q. Yesterday you didn’t. A. That isn’t correct, sir.”

It is obvious that there is no inconsistency between the above extracts. On the first occasion, petitioner’s counsel asked the agent what someone else meant by “old man.” On the second occasion he asked Mr. Gilkey if he knew the meaning of the term.

The other alleged inconsistencies seem to be immaterial (App. Br. 21-25). On the occasion of the extended inquiries into the character of Eddie Houston, the witness appeared to be somewhat confused by the questions, but resolved all confusions satisfactorily when he stated that he thought Houston was possibly a homosexual [R. 142, Vol. II]. The materiality of the entire line of questioning is also somewhat doubtful.

In any event the only real question Black raises is one of credibility. Such an inquiry is not open in a Section 2255 proceeding (see II, *infra*).

E. Similarly the character of Eddie Houston is not at issue here, especially since he did not answer any questions at the trial, but instead declined to answer on the basis of the Fifth Amendment [R. 213-215, Vol. II].

F. Petitioner’s insistence upon production of Grand Jury minutes is similarly without merit. There was no transcript taken of the testimony in the Grand Jury relating to this case. Reports of the officers involved in this

case, however, were given to defense counsel after such officers had testified on direct examination [R. 153-154, Vol. II]. This is all the *Jencks* decision required.

See:

Jencks v. United States, 353 U. S. 657 (1956).

See also: Title 18, United States Code, Section 3500, which clarifies the *Jencks* decision.

Even if there had been a transcript of testimony before the Grand Jury, petitioner would not have been entitled to it under the *Jencks* ruling.

Angelet v. United States, 255 F. 2d 383 (2d Cir., 1958).

See also:

Federal Rules of Criminal Procedure, Rule 6(e).

Petitioner's citation of Title 18, United States Code, Section 3432, relating to production of lists of jurors and witnesses had no application to this case since that section only applies to capital offenses.

G. Defendant Black was Afforded that Degree of Representation by Counsel Guaranteed Him by the Sixth Amendment.

A reading of the Reporter's Transcript of this case reveals that Mr. Welford R. Wilson, counsel for Amos Black, conducted a competent and vigorous defense. The complaint Mr. Black makes against Mr. Wilson has been considered many times by appellate courts, because convicts often blame their attorneys for their incarceration. In this regard, Judge Denman's observations in *Latimer v. Cranor*, 214 F. 2d 926, 929 (9th Cir., 1954) are applicable to the instant case:

"The application alleges that Latimer's attorney mishandled his case.

“This is a frequent contention of unsuccessful defendants. There are no allegations showing the attorney’s conduct was so incompetent that it made the case a farce requiring the Court to intervene in his client’s behalf. We find no denial of the efficient representation of the Constitution.”

See also:

Hall v. United States, 235 F. 2d 838 (D. C. Cir., 1956).

II.

Petitioner May Not Use Proceedings Under Title 28, United States Code, Section 2255, to Raise Issues Which Were Raised or Should Have Been Raised at the Trial, or Which Should Be Raised by Appeal.

Banghart v. United States, 208 F. 2d 902 (4th Cir., 1953);

Taylor v. United States, 177 F. 2d 194 (4th Cir., 1949);

Ford v. United States, 234 F. 2d 835 (6th Cir., 1956).

A. Thus petitioner’s questioning the credibility of Agent Gilkey’s testimony is not proper under Section 2255. Such inquiries are for the consideration of the jury.

B. Similarly the issue of entrapment was raised at the trial and argued quite competently by petitioner’s counsel [R. 226-236, Vol. II] and the Court instructed the jury on this defense [R. 257-258, Vol. II]. Even if it had not been raised at the trial, it cannot be raised here under the provisions of Section 2255.

Stanley v. United States, 239 F. 2d 765 (9th Cir., 1956);

United States v. Lyons, 256 F. 2d 749 (2nd Cir., 1958).

III.

This Court Has No Jurisdiction to Hear This Petition Because the Petitioner Is Not “in Custody Under Sentence.”

Section 2255 of Title 28, United States Code provides as follows:

“A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.”

In the instant case, petitioner Black has elected not to commence service of his sentence [see Appendix to this Brief, and R. 151, Vol. I], but instead has remained at the Los Angeles County Jail serving so-called “dead time.” A prisoner in such status may not attack a sentence imposed by the trial court for the reason that he is not “in custody *under sentence*” of the court (emphasis added).

Crow v. United States, 186 F. 2d 704, 707 (9th Cir., 1950) (defendant at time of petition was serving another sentence prior to service of the sentence he was attacking);

Lopez v. United States, 186 F. 2d 704 (9th Cir., 1950) (petitioner had already completed sentence he was attacking);

United States v. Bradford, 194 F. 2d 197 (2d Cir., 1951) (to the same effect as *Lopez*, *supra*).

IV.

Conclusion.

For the above stated reasons the order of the Court below should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

RONALD S. ROSEN,
Assistant U. S. Attorney,
Attorneys for Appellee.

ed States Marshal
Federal Building
Angeles, California

reby ~~do~~ do not elect to commence serving my sentence at an
stitution designated by the Attorney General pending outcome of
ppeal.

d: Sept 30th 1957

Amos Black
(Signature of Defendant)

ete "do" or "do not", whichever is appropriate).



No. 16292 ✓

**United States
Court of Appeals**
for the Ninth Circuit

JACK PAUL BROWN,

Appellant,

vs.

DEAN KAYLER, CHRIS DAHL d/b/a Kayler-
Dahl Fish Company,

Appellees.

Transcript of Record

FILED

FEB 25 1959

**Appeal from the District Court
for the District of Alaska,
Division Number One.**

PAUL P. O'BRIEN, CLERK



No. 16292

**United States
Court of Appeals**
for the Ninth Circuit

JACK PAUL BROWN,

Appellant,

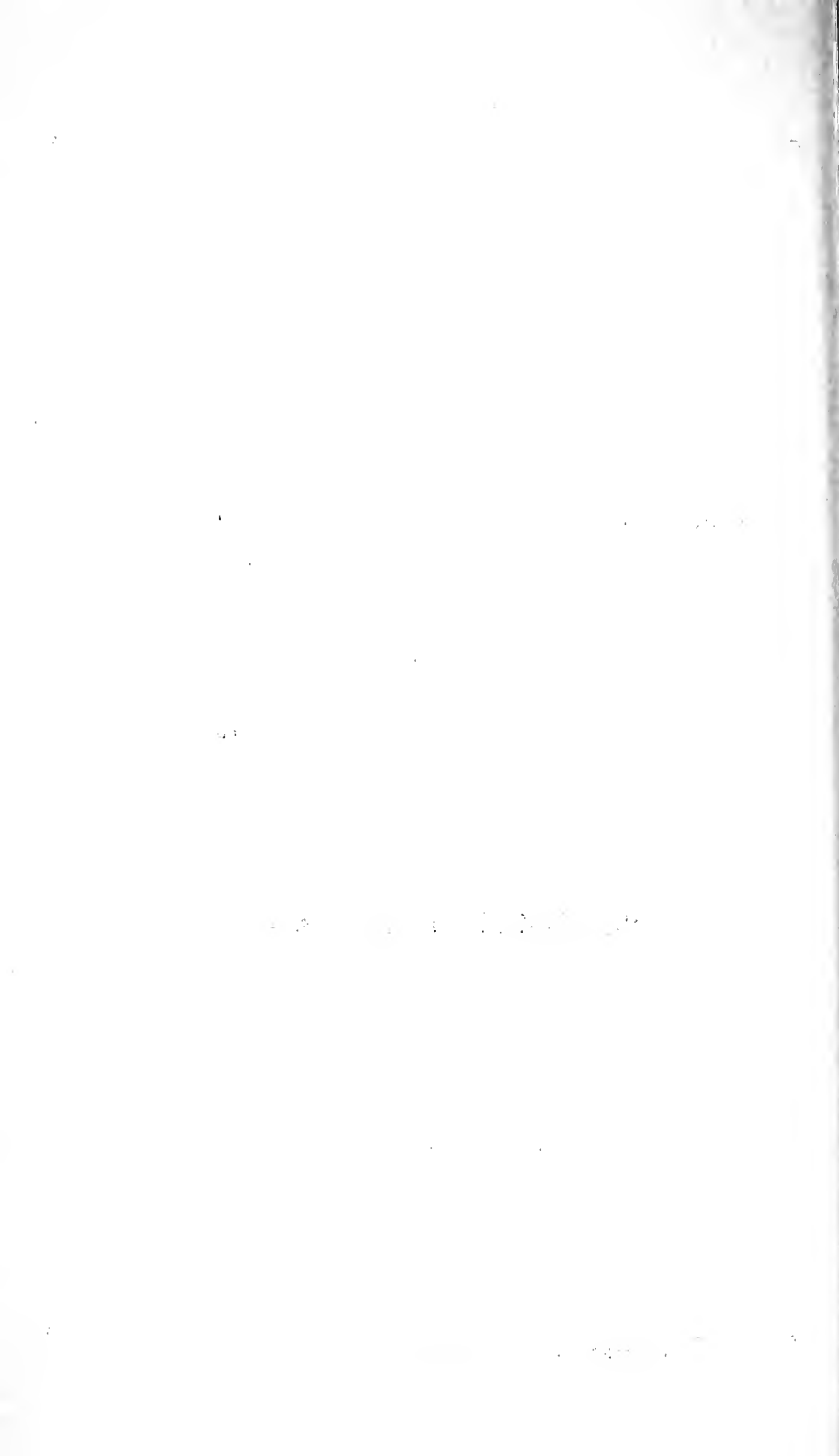
vs.

DEAN KAYLER, CHRIS DAHL d/b/a Kayler-
Dahl Fish Company,

Appellees.

Transcript of Record

**Appeal from the District Court
for the District of Alaska,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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COUNSEL OF RECORD

For Jack Paul Brown, Appellant:

ZIEGLER, ZIEGLER & CLOUDY,
Box 1079,
Ketchikan, Alaska.

For Dean Kayler, Chris Dahl and John Doe, d/b/a
Kayler-Dahl Fish Company, Appellee:

ROBERTSON, MONAGLE & EASTAUGH,
Box 1211,
Juneau, Alaska.

The District Court for the District of Alaska,
Division Number One, at Ketchikan

In Admiralty—Civil Action—File No. 3773-KA

JACK PAUL BROWN,

Libelant,

vs.

DEAN KAYLER, CHRIS DAHL and JOHN
DOE, d/b/a KAYLER-DAHL FISH COM-
PANY,

Respondent.

LIBEL

For cause of suit, libelant alleges:

I.

That at the times herein mentioned the above-named persons were engaged, under the name and style of Kayler-Dahl Fish Company, in Alaska, in the commercial fishery, and maintained at Excur-sion Inlet, Alaska, in the North Pacific Ocean, the vessel Homer; that the above-named persons owned said vessel and controlled and operated same in connection with said fishery.

II.

That at about 8:00 p.m., on September 27th, 1954, at said place, libelant landed his vessel, the Rebecca, alongside the Homer, in the navigable waters of the North Pacific Ocean; that he then had aboard his vessel a catch of salmon and sold the same to re-spondent, delivered same aboard the Homer, and

was directed by respondent to board the *Homer* in order to receive payment for his fish so delivered.

III.

That in order to do so, he was obliged to and did proceed over the top deck of the *Homer*, from the bow to the pilot house at the stern of the *Homer*; that in so doing, and at a distance of 8 feet more or less, from the pilot house, the deck became uneven, and dropped down several feet from the deck over which libelant was proceeding; that upon reaching the point where there was such change in the level of the deck, libelant fell and struck his head against the pilot house, or other structure of the *Homer*, sustaining injuries which resulted in his total disability.

IV.

That all of said injuries and consequent damages are a direct result of the failure of respondent to furnish libelant a good, safe and proper means of reaching the pilot house of the *Homer*, and by reason of the failure of respondent to furnish a seaworthy vessel, in that the deck was uneven and the *Homer* was insufficiently lighted to enable libelant to see the condition of the deck; that the vessel was unseaworthy also in that at the point where said accident occurred, there was hatch coaming raised above the deck which obscured from libelant the condition of the deck over which he fell; that respondent was negligent in the respect hereinbefore set forth, and that the accident and injuries received by libelant were due to said negligence.

V.

That as a result of said accident libelant sustained the following injuries: Fracture, skull, occipital, with cerebral concussion, hypertrophic osteo-arthritis changes in the cervical vertebrae and strain of cervical and lumbar muscles, caused by the fall, resulting in almost total blindness, pain and suffering and destruction of earning power, to his total damage of \$50,000.00.

VI.

That all and singular the matters set forth herein are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, the libelant prays that process in due form of law issue against the respondent, requiring it to answer the premises, and that this Honorable Court may decree to the libelant as follows:

Damages in the sum of \$50,000.00, with attorneys fees and costs, and such other, further and different relief as the nature of the case may require.

ZIEGLER, ZIEGLER &
CLOUDY,

By /s/ A. H. ZIEGLER,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed November 29, 1956.

[Title of District Court and Cause.]

EXCEPTIONS TO LIBEL

To the District Court for the District of Alaska,
Division Number One, at Ketchikan, in Admiralty:

The exceptions of Respondents Dean Kayler, Chris Dahl, and Kayler-Dahl Fish Company, claimants of the vessel *Homer*, allege as follows:

1.

That it appears from the libel and its averments that Libelant's claimed injuries were suffered on September 27, 1954, more than two years prior to the filing on November 29, 1956, of the libel and to the issuance on November 29, 1956, of the Monition herein, and disclose the staleness of Libelant's demand and his guilt of laches herein, whereas Section 55-2-7, ACLA, 1949, provides that an action for any injury to the person or to the rights of another not arising from contact shall be brought within two years from the date of suffering such injury.

2.

That the facts averred in the libel are insufficient to constitute a cause of action.

3.

That the facts averred in the libel do not constitute a cause of action within the admiralty and maritime jurisdiction of this Court.

Dated at Juneau, Alaska, December 19, 1956.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Proctors for Respondents Dean Kayler, Chris Dahl
and Kayler-Dahl Fish Company.

[Endorsed]: Filed December 21, 1956.

[Title of District Court and Cause.]

RESPONDENTS' STIPULATION
FOR COSTS

Whereas, a libel was filed in this Court on the 29th day of November, 1956, by Jack Paul Brown, Libelant, against Dean Kayler, Chris Dahl, and John Doe, doing business as Kayler-Dahl Fish Company, Respondent, for reasons and causes in said libel mentioned;

And the Respondents, Dean Kayler, Chris Dahl, and Kayler-Dahl Fish Company, parties hereto, and the United States Fidelity and Guaranty Company, a corporation, Surety, hereby consenting and agreeing that in case of default or contumacy on the part of said Respondents or said surety, execution may issue against their goods, chattels and lands for the sum of Five Hundred Dollars.

Now, Therefore, It Is Hereby Stipulated and Agreed for the benefit of whom it may concern, that

the undersigned shall be, and each of them is, bound in the sum of Five Hundred Dollars, conditioned the above-named Dean Kayler, Chris Dahl, and Kayler-Dahl Fish Company shall pay all costs and charges that may be awarded against them in any decree by this Court, or, in case of appeal, by the Appellate Court.

DEAN KAYLER, CHRIS DAHL, and KAYLER-
DAHL FISH COMPANY,

Respondents;

By /s/ R. E. ROBERTSON,

This Proctor, Principals.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

By /s/ R. E. ROBERTSON,

Attorney-in-Fact.

Taken and acknowledged before me this 19th day of December, 1956, by R. E. Robertson as Proctor for said Respondents and as Attorney-in-Fact for the United States Fidelity and Guaranty Company.

[Seal] /s/ FREDERICK O. EASTAUGH,
Notary Public for Alaska.

My commission expires June 10, 1958.

[Endorsed]: Filed December 21, 1956.

[Title of District Court and Cause.]

AMENDED LIBEL

Comes now libelant, leave of Court first having been obtained, and files his amended libel, and alleges:

I.

That at the times herein mentioned the above-named persons were engaged, under the name and style of Kayler-Dahl Fish Company, in Alaska, in the commercial fishery, and maintained at Excursion Inlet, Alaska, in the North Pacific Ocean, the vessel Homer; that the above-named persons owned said vessel and controlled and operated same in connection with said fishery.

II.

That at about 8 p.m. on September 27th, 1954, at said place, libelant landed his vessel, the Rebecca, alongside the Homer, in the navigable waters of the North Pacific Ocean; that he then had aboard his vessel a catch of salmon and sold the same to respondent, delivered same aboard the Homer, and was directed by respondents to board the Homer in order to receive payment for his fish so delivered.

III.

That in order to do so, he was obliged to and did proceed over the top deck of the Homer, from the bow to the pilot house at the stern of the Homer; that in so doing, and at a distance of 8 feet more or

less, from the pilot house, the deck became uneven, and dropped down several feet from the deck over which libelant was proceeding; that upon reaching the point where there was such change in the level of the deck, libelant fell and struck his head against the pilot house, or other structure of the *Homer*, sustaining injuries which resulted in his total disability.

IV.

That all of said injuries and consequent damages are a direct result of the failure of respondent to furnish libelant a good, safe and proper means of reaching the pilot house of the *Homer*, and by reason of the failure of respondent to furnish a seaworthy vessel, in that the deck was uneven and the *Homer* was insufficiently lighted to enable libelant to see the condition of the deck; that the vessel was unseaworthy also in that at the point where said accident occurred, there was hatch coaming raised above the deck which obscured from libelant the condition of the deck over which he fell; that respondent was negligent in the respect hereinbefore set forth, and that the accident and injuries received by libelant were due to said negligence.

V.

That as a result of said accident libelant sustained the following injuries: Fracture, skull, occipital, with cerebral concussion, hypertrophic osteo-arthritic changes in the cervical vertebrae and strain of cervical and lumbar muscles, caused by

the fall, resulting in almost total blindness, pain and suffering and destruction of earning power, to his total damage of \$50,000.00.

VI.

That all and singular the matters set forth herein are true and within the admiralty jurisdiction of this Honorable Court.

VII.

Libelant alleges that the libel was not filed within 2 years from the date of the accident, but alleges libelant was not guilty of laches and the delay is not inexcusable for the following reasons.

VIII.

As a result of said accident libelant had not recovered from the injuries sustained before the expiration of the two-year period fixed by the Alaska Statute, and has not now recovered from same; that he wished to delay commencement of the suit as long as possible in order to determine as well as he could the extent of his injuries; that, however, he filed a suit under the Alaska Statute for damages before the expiration of said two-year period; that said suit was filed against Kayler-Dahl Fish Co., Inc., a corporation; that libelant believed and reported to his counsel that the owner of the barge Homer, upon which he was injured, was operated by and under the control of said corporation; that libelant is an Indian and unfamiliar with legal mat-

ters as to whether anyone who represents itself as a company, which respondent did at the time of the accident, was a trade name, company or corporation, but honestly believed and so reported to his counsel that respondent was a corporation; that after suit was filed and against respondent as a corporation, a motion was filed to dismiss based on the ground that Kayler-Dahl Fish Co., Inc., a corporation, was not in existence on the date of the accident, although it had been in existence as a corporation for a long time prior to the accident; that investigation of respondents' claim as to the dissolution of the corporation disclosed that the corporation had been dissolved prior to the date of the accident; that for such reason libelant could not oppose said motion to dismiss and his action was dismissed; that said motion to dismiss was not filed until the two-year period had expired and libelant could not refile his suit under the Alaska Statute within the two-year period.

IX.

Libelant believes and alleges that respondents were the owners of all the assets of said dissolved corporation; that upon dissolution, the entire assets were transferred to respondents who still conducted the business under the name of Kayler-Dahl Fish Company; that any judgment in this suit against respondents would be against them as individuals and they are not prejudiced by the short delay any greater than if the suit under the Alaska Statute

had been commenced against them as individuals, rather than as a corporation, as it was.

X.

Libelant further alleges that this is a suit in personam and the rights of lien creditors and others cannot be prejudiced by the prosecution of this suit.

XI.

Libelant alleges that if the doctrine of laches be applied in his suit he will be deprived of his day in court and will sustain incalculable loss and damage.

Wherefore, Libelant prays that process in due form of law issue against the respondents, requiring them to answer the premises, and that this Honorable Court may decree to the libelant as follows:

Damages in the sum of \$50,000.00, with attorneys fees and costs, and such other, further and different relief as the nature of the case may require.

ZIEGLER, ZIEGLER &
CLOUDY,

By /s/ A. H. ZIEGLER,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed April 25, 1957.

[Title of District Court and Cause.]

EXCEPTIONS TO AMENDED LIBEL

To the District Court for the District of Alaska,
Division Number One, at Ketchikan, in Ad-
miralty:

The exceptions of Respondents Dean Kayler,
Chris Dahl, and Kayler-Dahl Fish Company, claim-
ants of the vessel Homer, allege as follows:

1.

That it appears from the Amended Libel and its averments that Libelant's claimed injuries were suffered on September 27, 1954, more than two years prior to the filing on November 29, 1956, of the Libel and to the issuance on November 29, 1956, of the Monition herein, which disclose the staleness of Libelant's demand and his guilt of laches herein, whereas Section 55-2-7, ACLA 1949, provides that an action for any injury to the person or to the rights of another not arising from contract shall be brought within two years from the date of suffering such injury.

2.

That the facts averred in the Amended Libel are insufficient to constitute a cause of action, and do not show that Libelant was either a seaman, a shipper or a passenger, or that the alleged unseaworthiness of the barge Homer gives any right of action to Libelant, or that Libelant has any claim or right of action against Libelees because of the

alleged unseaworthiness of the barge, Homer, or that a good, safe and proper means of reaching the pilot house of said vessel was not furnished to Libelant or that the means furnished was not in accordance with the usual construction of such vessels as the barge, Homer, or that Libelant was not priorly informed and knew the construction of said vessel and the means by which to reach the pilot house thereof, or that Libelant's alleged injuries were proximately caused by any negligence of Libelees or either of them.

3.

That the facts averred in the Amended Libel do not constitute a cause of action within the admiralty and maritime jurisdiction of this Court.

4.

Libelees further except to Paragraphs VII, VIII, IX, X and XI of the Amended Libel on the ground they do not state a valid excuse for Libelant's failure to file his action within two years from the date of incurring his alleged injuries on September 27, 1954, and fail to show that Libelees or any of them were at fault for Libelant's said failure; that Libelant was represented by competent, practicing proctors prior to two years before September 27, 1956; that the corporate records of the Territory of Alaska are public records, and Libelant and his proctors knew or should have known when he instituted in this Court his civil action No. 3731-KA, that no corporation by the name of Kayler-Dahl Fish Co., Inc., or similar name, was registered for

the doing of business in Alaska on September 27, 1954, and also that the U. S. Customs records, which are also public records, did not show that on September 27, 1954, any such named or similarly named corporation owned or had any interest in the barge Homer; that Libelees have never been officially informed that said Civil Action No. 3731-KA has been dismissed; that Libelant is solely at fault for his staleness and laches in instituting this suit and in presenting his claim therein.

Dated at Juneau, Alaska, April 27, 1957.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Proctors for Respondent Dean Kayler, Chris Dahl
and Kayler-Dahl Fish Company.

[Endorsed]: Filed May 1, 1957.

[Title of District Court and Cause.]

OPINION

Filed November 6, 1957

Appearances:

A. H. ZIEGLER, of Ziegler, Ziegler & Cloudy,
For libelant.

R. E. ROBERTSON, of Robertson, Monagle &
Eastaugh, by F. O. Eastaugh,
For respondents.

This matter came on before the court for argument upon exceptions to the amended libel filed herein, which exceptions allege as follows:

(1) That the libelant claimed injuries were suffered on September 27, 1954, more than two years prior to the filing on November 29, 1956, of the libel, and to the issuance on November 29, 1956, of the monition herein which pleadings disclose the staleness of libelant's demand and his guilt of laches for the reason that Sec. 55-2-7, ACLA 1949, provides that an action for any injury to the person or to the rights of another not arising from contract shall be brought within two years from the date of suffering such injury.

(2) That the averred facts in the amended libel are insufficient to constitute a cause of action and do not show that libelant was either a seaman, a shipper, or a passenger or that any action arises by the alleged unseaworthiness of the barge Homer, or that libelant has any claim or right of action because of such alleged unseaworthiness, or that a good, safe and proper means of reaching the pilothouse of said vessel was not furnished libelant, or that the means furnished was not in accordance with the usual construction of such vessels, or that libelant was not previously informed and knew the construction of said vessel and the means by which to reach the pilothouse thereof, or that any alleged negligence of the respondents was the proximate cause of libelant's alleged injuries.

(3) That the facts averred in the amended libel

do not constitute a cause of action within the admiralty and maritime jurisdiction of this court.

(4) That the excuse of laches, as set forth in paragraphs VII, VIII, IX, X, and XI, of the amended libel, does not constitute a valid ground to excuse libelant's failure to file his libel within two years after the cause of action arose.

It appears from the pleadings and the undisputed statements of counsel, that the sequence of events is substantially as follows:

(1) That at about 8:00 p.m. on September 27, 1954, at Excursion Inlet, Alaska, in the North Pacific Ocean, where respondents maintained their vessel Homer, libelant landed his vessel, the Rebecca, alongside the Homer, in navigable waters, and that said libelant had aboard his vessel a catch of salmon which he sold to the respondents and delivered aboard the Homer and was then directed by respondents to board the Homer in order to receive payment for the fish.

(2) That the libelant proceeded over the top deck of the Homer from the bow to the pilothouse, at or near the stern of the Homer, and that at a distance of about 8 feet from the said pilothouse the deck became uneven and that upon reaching this point of change in the level of the deck, libelant fell, striking his head against the pilothouse or other structure, sustaining injuries which resulted in his total disability.

It is admitted on the part of libelant that the libel was not filed within two years from the date of said accident but that same was filed on November 29, 1956, over two months after the statute of limitations had expired on September 27, 1956.

Libelant contends that the delay in filing the action was excusable for the following reasons:

(1) As a result of said accident, libelant had not recovered from the injury sustained before the expiration of the two-year period fixed by the Alaska statute and has not now recovered from the same.

(2) That libelant wished to delay commencement of the suit as long as possible in order to determine as well as he could the extent of his injuries.

(3) That libelant filed suit under the Alaska statute for damages before the expiration of the two-year period but that suit was filed against Kayler-Dahl Fish Company, Inc., a corporation; that libelant believed and had reported to his counsel that the barge Homer was operated by and under the control of said corporation at the time he was injured thereon.

(4) That libelant is an Indian and unfamiliar with legal matters and had no knowledge of whether this was a trade name, a company, or a corporation, but believed and reported to his counsel that it was a corporation.

(5) That after suit was filed as aforesaid against Kayler-Dahl Fish Company, a corporation,

said action was dismissed for the reason that the Kayler-Dahl Fish Company corporation had been dissolved prior to the time of the accident.

(6) That said motion to dismiss was not filed until the two-year period had expired and libelant was precluded from refileing his suit under the Alaska statute within the two-year period.

(7) That the respondents are believed to be the owners of all the assets of said dissolved corporation, which were transferred to the respondents as individuals upon dissolution.

(8) That the respondents as individuals are not prejudiced by the delay.

(9) That this is a suit in personam and the rights of lien creditors and others cannot be prejudiced thereby.

(10) That if the doctrine of laches be applied herein, libelant will be deprived of his day in court and will sustain incalculable loss and damage.

Respondent points out that the common-law suit against the nonexistent corporation was filed a mere nine days before the expiration of the two-year period for filing as permitted by the statute.

Counsel for libelant and respondents both presented able arguments in open court and carefully prepared briefs in connection therewith, and it appears to this Court that the issue is narrowed down herein to the following questions:

(1) Whether or not the allegations in the amended libel as set forth in paragraphs III and IV thereof, are sufficient to allege a cause of action based upon negligence and unseaworthiness of the vessel.

(2) Whether or not the delay in bringing this action over two months after the expiration of the statute of limitations bars the maintenance of said action.

(3) Whether or not the excuse and reasons for the delay as set forth in the pleadings are sufficient, if sustained, to excuse the laches and permit the bringing of a tardy action.

While it appears to this Court that there is considerable merit to the respondent's contention that

(1) the libel does not sufficiently allege facts showing the alleged negligence relied upon, and

(2) the libel does not properly or sufficiently allege any duty owed libelant, any failure to perform such duty, or any injuries resulting therefrom.

I do not feel a finding on these points is necessary in view of the determination made hereinafter upon the question presented alleging failure to bring the action herein timely, that is, within the period after the cause of action arose, as required by Sec. 55-2-7 ACLA 1949.

I hold that this case is one barred by the statute and that the excuses presented for the laches of

libelant in failure to bring the action within the two-year period are insufficient reasons in law or equity.

It is pointed out in libelant's brief that the powers of a court of admiralty are so broad and the considerations which impel its actions so extensive that it has been called, as distinguished from a court of law or a court of equity, a court of justice.

It should here be pointed out that Justice wields a two-edged sword; the rights of both parties to an issue must be examined. The basic reasons for a statute of limitation are to encourage promptness in the prosecution of remedies and to discourage delay. It is just as necessary to protect one against whom a claim might be asserted as it is to guard the rights of a claimant, but the statute of limitation is aimed to protect one against whom a claim might be asserted from penalties resulting from the passage of time, when witnesses have died, scattered, or disappeared, evidence has vanished or been misplaced, lost, or destroyed, facts have been obscured by defect of memory and lapse of time, as well as from the element of surprise.

Where statutes of limitation are passed they point out to those who would use the court that the courts are open to claimants for the period permitted under the statute and not thereafter, and it is only in the case of the gravest injustice, under most exceptional circumstances, where no fault inures to the claimant, and then only in the exercise of sound judgment where real equitable considera-

tions exist, that the court is permitted to exercise discretion in waiving the laches complained of. Westfall Larson & Co., et al., vs. Allman-Hubble Tugboat Co., 73 F. 2d. 200.

None of the excuses or reasons for delay are sufficient to overcome the presumption of prejudice to respondent.

None of these reasons present a condition which proper diligence could not have avoided.

The common-law action is barred and it would be inconsistent to allow libelant to sue in admiralty with the same effect as at common law thereafter under these circumstances. McGrath v. Panama R. Co., 298 F. 303; Marshall v. International Mercantile Marine Co. 39 F. 2d. 551.

The exceptions are allowed and the complaint and the action will be dismissed with prejudice.

Respondents will prepare and present proper judgment.

/s/ RAYMOND J. KELLY,
U. S. District Judge.

[Endorsed]: Filed November 6, 1957.

[Title of District Court and Cause.]

ORDER AMENDING OPINION

This Court, having on November 6th, 1957, rendered its opinion, allowing the exceptions filed by

respondent, to the libel, and providing that the complaint and the action will be dismissed with prejudice; and,

Proctors for libelant having orally applied for permission to file an Amended Libel.

Now, therefore, it is hereby ordered that the Opinion of the Court is amended to provide as follows:

“The exceptions of Respondent are allowed, and the libelant is allowed thirty days from November 7th, 1957, in which to file an Amended Libel, and that upon his failure so to do, the suit and action will be dismissed with prejudice.”

Dated at Ketchikan, Alaska, November 7th, 1957.

/s/ RAYMOND J. KELLY,
Judge.

[Title of District Court and Cause.]

SECOND AMENDED LIBEL

Comes now libelant, leave of Court first having been obtained, and files his second amended libel, and alleges:

I.

That at the times herein mentioned the above-named persons were engaged, under the name and style of Kayler-Dahl Fish Company, in Alaska, in the commercial fishery, and maintained at Excur-sion Inlet, Alaska, in the North Pacific Ocean, the

vessel Homer; that the above-named persons owned said vessel and controlled and operated same in connection with said fishery.

II.

That at about 8 p.m. on September 27th, 1954, at said place, libelant landed his vessel, the Rebecca, alongside the Homer, in the navigable waters of the North Pacific Ocean; that he then had aboard his vessel a catch of salmon and sold the same to respondent, delivered same aboard the Homer, and was directed by respondent to board the Homer in order to receive payment for his fish so delivered.

III.

That in order to do so, he was obliged to and did, proceed over the top deck of the Homer, from the bow to the pilot house at the stern of the Homer; that in so doing, and at a distance of eight feet, more or less, from the pilot house, the deck was constructed in an uneven manner, and dropped down several feet from the deck over which libelant was proceeding; that upon reaching the point where there was such change in the level of the deck, libelant fell and struck his head with great force against the pilothouse, or other structure of the Homer, sustaining injuries which resulted in his total blindness and total disability.

IV.

That libelant was invited and instructed by respondents to go aboard the Homer to receive

payment for his fish; that it was the duty of respondents, the owner, master and officers of the *Homer* to provide libelant with a good, safe means of reaching the pilothouse and a seaworthy vessel for said purpose, and to keep said vessel and passageway sufficiently lighted so the libelant could see and observe the condition thereof; that they failed so to do in that the deck, passageway and pilothouse were dark and insufficiently lighted to enable libelant to see or observe that the deck where libelant fell was uneven; that the respondents, the owner, master and officers of the *Homer* were negligent in failing to provide such adequate and sufficient lighting and libelant's injuries and consequent damages are a direct result of said negligence, and that said injuries were not due to any negligence on the part of the libelant.

V.

That as a result of said accident libelant sustained the following injuries: fracture, skull, occipital, with cerebral concussion, hypertrophic osteoarthritis changes in the cervical vertebrae and strain of cervical and lumbar muscles, caused by the fall, resulting in total blindness, pain and suffering and loss of earning ability, to his total damage of \$50,000.00.

VI.

That all and singular the matters set forth herein are true and within the admiralty jurisdiction of this Honorable Court.

VII.

Libelant alleges that the libel was not filed within two years from the date of the accident, but alleges libelant was not guilty of laches and the delay is not inexcusable for the following reasons.

VIII.

As a result of said accident libelant had not recovered from the injuries sustained before the expiration of the two-year period fixed by the Alaska Statute, and has not now recovered from same; that he wished to delay commencement of the suit as long as possible in order to determine as well as he could the extent of his injuries; that, however, he filed a suit under the Alaska Statute for damages before the expiration of said two-year period; that said suit was filed against Kayler-Dahl Fish Co., Inc., a corporation; that libelant believed and reported to his counsel that the owner of the barge Homer, upon which he was injured, was operated by and under the control of said corporation; that libelant is an Indian and unfamiliar with legal matters as to whether anyone who represents itself as a company, which respondent did at the time of the accident, was a trade name, company or corporation, but honestly believed and so reported to his counsel that respondent was a corporation; that after suit was filed against respondent as a corporation, a motion was filed to dismiss based on the ground that Kayler-Dahl Fish Co., Inc., a corporation was not in existence on the date of the accident, although it had been in existence

as a corporation for a long time prior to the accident; that investigation of respondent's claim as to the dissolution of the corporation disclosed that the corporation had been dissolved prior to the date of the accident; that for such reason libelant could not oppose said motion to dismiss and his action brought under the Alaska Statute was dismissed; that said motion was not filed until the two-year period had expired and libelant could not refile his suit under the Alaska Statute within the two-year period.

IX.

Libelant further alleges in support of his claim that the delay was not inexcusable, as follows: That when he was first injured he consulted counsel, other than his present Proctors; that said counsel prepared, but did not file, a complaint for his injuries; that said complaint was framed against the respondents as a corporation; that his then counsel moved from the Territory of Alaska; that said complaint was furnished to libelant's present proctors who had reference thereto in preparing his suit under the Alaska two-year statute; that, however, before filing the suit which was dismissed, his present proctors, so he is informed, alleges and believes, duly checked the Record of Corporations in the Territory of Alaska, which Directory was prepared and distributed by the Territory, and learned therefrom that Kayler-Dahl Fish Co., Inc., appeared in said Directory as a corporation, incorporated in the State of Washington, Sept. 5, 1947, and filed in Alaska June 1, 1949.

X.

Libelant believes and alleges that respondents are the owners of all the assets of said dissolved corporation; that upon dissolution, the entire assets were transferred to the respondents who still conducted the business under the name of Kayler-Dahl Fish Company; that any judgment in this suit against respondents would be against them as individuals and they are not prejudiced by the short delay any greater than if the suit under the Alaska two-year statute had been commenced against them as individuals, rather than as a corporation, as it was.

XI.

Libelant further alleges that this is a suit in personam, and the rights of lien creditors and others cannot be prejudiced by prosecution of this suit; but, if so, such rights can be protected by the Court at the trial.

XII.

Libelant further alleges that this suit and situation should have applied to it the equitable principles of the Admiralty Court, and that if the doctrine of laches be applied he will be deprived of his day in court and will sustain incalculable loss and damage.

Wherefore, Libelant prays that process in due form of law issue against the respondents, requiring them to answer the premises, and that this Honorable Court may decree to the libelant as follows:

Damages in the sum of \$50,000.00, with attorney

fees and costs, and such other, further and different relief as to the Court may seem equitable.

ZIEGLER, ZIEGLER &
CLOUDY,

By /s/ A. H. ZIEGLER,
Proctors.

Duly verified.

[Endorsed]: Filed December 2, 1957.

[Title of District Court and Cause.]

EXCEPTIONS TO SECOND AMENDED LIBEL

To the District Court for the District of Alaska,
Division Number One, at Ketchikan, in Ad-
miralty:

The exceptions of Respondents Dean Kayler, Chris Dahl, and Kayler-Dahl Fish Company, claimants of the vessel Homer, allege as follows:

1.

That it appears from the Second Amended Libel and its averments that Libelant's claimed injuries were suffered on September 27, 1954, more than two years prior to the filing on November 29, 1956, of the Libel and to the issuance on November 29, 1956, of the Monition herein, which disclose the staleness of Libelant's demand and his guilt of laches herein, whereas Section 55-2-27, ACLA, 1949, provides that an action for any injury to the person or to the rights

of another not arising from contract shall be brought within two years from the date of suffering such injury.

2.

That the facts averred in the Second Amended Libel are insufficient to constitute a cause of action, and do not show that Libelant was either a seaman, a shipper or a passenger, or that the alleged unseaworthiness of the barge Homer gives any right of action to Libelant, or that Libelant has any claim or right of action against Libelees because of the alleged unseaworthiness of the barge Homer, or that a good, safe and proper means of reaching the pilot house of said vessel was not furnished to Libelant or that the means furnished was not in accordance with the usual construction of such vessels as the barge Homer, or that Libelant was not priorly informed and knew the construction of said vessel and the means by which to reach the pilot house thereof, or that Libelant's alleged injuries were proximately caused by any negligence of Libelees or either of them.

3.

That the facts averred in the Second Amended Libel do not constitute a cause of action within the admiralty and maritime jurisdiction of this Court.

4.

Libelees further except to Paragraphs VII, VIII, IX, X, XI and XII of the Second Amended Libel on the ground they do not state a valid excuse for Libelant's failure to file his action within two years

from the date of incurring his alleged injuries on September 27, 1954, and fail to show that Libelees or any of them were at fault for Libelant's said failure; that Libelant was represented by competent, practicing proctors prior to two years before September 27, 1956; that the corporate records of the Territory of Alaska are public records, and Libelant and his proctors knew or should have known when he instituted in this Court his civil action No. 3731-KA, that no corporation by the name of Kayler-Dahl Fish Co., Inc., or similar name, was registered for the doing of business in Alaska on September 27, 1954, and also that the U. S. Customs records, which are also public records, did not show that on September 27, 1954, any such named or similarly named corporation owned or had any interest in the barge Homer; that Libelees have never been officially informed that said Civil Action No. 3731-KA has been dismissed; that Libelant is solely at fault for his staleness and laches in instituting this suit and in presenting his claim therein.

Dated at Juneau, Alaska, December 10, 1957.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Proctors for Respondent Dean Kayler, Chris Dahl
and Kayler-Dahl Fish Company.

[Endorsed]: Filed December 14, 1957.

[Title of District Court and Cause.]

OPINION

Filed July 8, 1958

Appearances:

A. H. ZIEGLER, of Ziegler, Ziegler & Cloudy,
Ketchikan, for Libelant.

ROBERTSON, MONAGLE & EASTAUGH,
by F. O. Eastaugh, Juneau, for Respond-
ents.

This matter comes before this court upon exceptions to the second amended libel filed herein by the respondents. The court had heard the exceptions to the first amended libel filed herein and after oral argument and briefs from the parties, filed an opinion allowing the exceptions of respondents and allowing libelant 30 days from November 7, 1957, in which to file an amended libel. It is this which is now before us.

A careful reading of the second amended libel does not disclose to this Court any facts pleaded, which, if proven, would be sufficient to excuse the delay in filing this action, nor does it disclose any new facts which, if proven on the trial, would overcome the presumption of prejudice which exists as set forth in the former opinion herein. The presumption of prejudice still exists, and libelant's claim that no prejudice to respondents has resulted by reason of delay cannot be considered because the presumption exists and nothing in the second amended libel removes it.

The element of laches still exists and nothing in the second amended libel states any facts which make it inequitable to apply this doctrine here. As a matter of fact it would be extremely inequitable not to apply it. The libelant waited almost two years and just before the statute of limitations would run, filed suit. However, the action was brought against improperly named parties and for that reason was dismissed.

All of the cases cited by the libelant show circumstances which did not exist here. In *Walker v. Foster*, 92 F. Supp. 402, the amended complaint contained the necessary allegations to overcome the presumption of prejudice. No such facts are pleaded here. In *McDaniel v. Gulf & South American Steamship Co., Inc.*, 228 F. 2d 189, the court found that the positive averments of the libel disclosed a case of clearly excusable delay because of the mental condition of the libelant arising by reason of a fractured skull as a result of the accident about which the action arose. In the case cited by libelant, *The Fulton*, 54 F. 2d 467, an equitable reason appeared for not applying the bar of laches and this consisted of protracted negotiations for settlement. In *Gardner v. Panama Railroad Co.*, 342 U. S. 29, the petitioner had diligently sought redress and had twice within the year following her injuries brought suit. The second action abated through an act of Congress and not through any fault of her own, and the United States Supreme Court determined that there was excusable delay for these reasons.

It is unnecessary to go into all of the cases cited by libelant in his supporting brief for the reason that in accordance with the previous opinion of this Court, the libelant's second amended libel discloses no equitable reason for the Court making any change in the decision rendered.

None of the matters stated in the second amended libel is sufficient to excuse libelant's failure to file his libel within the period allowed by the statute of limitations, and no facts are pleaded therein which would overcome the presumption of prejudice cloaking the respondents.

The foregoing shall constitute Findings of Fact and Conclusions of Law unless the parties desire additional Findings or Conclusions.

Respondents will prepare and present proper judgment in accordance herewith.

/s/ RAYMOND J. KELLY,
U. S. District Judge.

[Endorsed]: Filed July 8, 1958.

[Title of District Court and Cause.]

NOTICE OF SETTLEMENT OF DECREE

To: Ziegler, Ziegler & Cloudy, Proctors for Libelant:

Please Take Notice that a Final Decree, of which the within is a copy, will be presented for settle-

ment and signature to the Honorable Raymond J. Kelly, Judge of the above-entitled Court, in open Court at Juneau, Alaska, on the 28th day of July, 1958.

Dated at Juneau, Alaska, this 21st day of July, 1958.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ F. O. EASTAUGH,
Proctors for Respondents.

[Endorsed]: Filed July 21, 1958.

In the District Court for the District of Alaska,
Division Number One, at Ketchikan

In Admiralty—File No. 3773—KA

JACK PAUL BROWN,

Libelant,

vs.

DEAN KAYLER, CHRIS DAHL and JOHN
DOE, d/b/a KAYLER-DAHL FISH COM-
PANY,

Respondents.

FINAL DECREE

This cause having duly come before the Court upon Respondents' Exceptions to the Amended Libel by brief and oral argument of counsel for

the parties on October 15, 1957, and the Court having made and filed herein its Opinion of November 6, 1957, amended on November 7, 1957, to permit Libelant to amend, and upon Respondents' Exceptions to Libelant's Second Amended Libel, submitted to the Court upon briefs of counsel for the parties hereto, and the Court having made and filed its Opinion of July 8, 1958, directing a Decree dismissing the Second Amended Libel with prejudice,

Now, on motion of Robertson, Monagle & Eastaugh, Proctors for Respondents, it is

Ordered that the Opinions of this Court, heretofore made and filed herein, respectively, dated November 6, 1957, as amended as aforesaid, and July 8, 1958, be and they are hereby adopted as Findings of Fact and Conclusions of Law pursuant to Supreme Court Rule 46 $\frac{1}{2}$, and it is further

Ordered, Adjudged and Decreed, that the Second Amended Libel herein be and the same hereby is dismissed with prejudice, each party to bear its own costs.

Done in open Court at Juneau, Alaska, this 28th day of July, 1958.

/s/ RAYMOND J. KELLY,
U. S. District Judge.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above-Named Respondent, and Their Proctors, Robertson, Monagle and Eastaugh:

Notice Is Hereby Given that the above-named Libelant hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on July 28th, 1958.

Dated October 24th, 1958.

ZIEGLER, ZIEGLER &
CLOUDY,

By /s/ A. H. ZIEGLER,
Proctors for Libelant.

[Endorsed]: Filed October 24, 1958.

[Title of District Court and Cause.]

POINTS ON APPEAL

Appellant hereby states the points on which he will rely on this appeal.

1. The Court erred in sustaining the exceptions of Respondent to the Libel.

2. The Court erred in entering judgment in favor of Respondent and against Libelant in dismissing Libelant's Second Amended Libel.

Dated October 24th, 1958.

ZIEGLER, ZIEGLER &
CLOUDY,

By /s/ A. H. ZIEGLER,
Proctors for Libelant.

[Endorsed]: Filed October 24, 1958.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That the undersigned principal and the undersigned surety are held and firmly bound unto the respondent, in the full sum of \$250.00, lawful money of the United States of America, to be paid to said respondent, their heirs, executors, administrators and assigns, to which payment, well and truly to be made, the said principal and surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed with our seals and dated this 24th day of October, 1958.

Whereas, Libelant have prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit from a final judgment of the District Court for the District of Alaska, Division Number One at Ketchikan, bearing date July 28th, 1958.

Now, Therefore, the condition of this obligation is such that if the above-named appellant, shall prosecute said appeal to effect, and pay all costs which may be awarded against him as such appellant if the appeal is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

JACK PAUL BROWN,

By /s/ A. H. ZIEGLER,
Attorney, Principal;

/s/ A. D. ROBERTSON,
Surety.

[Endorsed]: Filed October 24, 1958.

[Title of District Court and Cause.]

MINUTE ORDERS

Monday—April 8, 1957

There appeared Mr. A. H. Ziegler who moved for permission to file an amended Libel herein and asked for 21 days in which to file.

The Court granted permission for the filing and also the time requested.

Friday—May 10, 1957

At this time the Court announced that a telegram had been received from R. E. Robertson, counsel for defendants by which he agreed that hearings

on Defendants' exceptions to the Amended Libel could go over until the return of A. H. Ziegler from the south. The Court thereupon ordered that the matter be put over till the Fall Term.

Tuesday—October 15, 1957

This case came before the Court for hearing on Respondents' Exceptions to the Amended Libel herein. A. H. Ziegler appeared for Libelant; F. O. Eastaugh appeared for Respondent, in behalf of R. E. Robertson. Counsel argued the exceptions before the Court with Mr. Eastaugh commencing with No. 3 on Jurisdiction; then on to Exception numbered 2, with Nos. 1 and 4 being argued together. Mr. Ziegler then presented his argument following which the Court took the matter under advisement with counsel filing their briefs.

Wednesday—November 6, 1957

There appeared A. H. Ziegler who asked the Court to amend its recent Opinion in this case to include an exception therein to Libelant or to allow 30 days for the filing of an Amended Libel if he so desired.

The Court granted the request.

Thursday—November 7, 1957

Upon the presentation of an Order by Proctors of record, the Court signed the Order; ordered it filed and entered.

Friday—April 11, 1958

Upon the request of counsel, this matter was re-set for hearing and argument on April 25th.

Friday—April 25, 1958

This matter came upon the Motion Calendar for hearing Respondent's Exceptions to the Seconded Amended Libel. The Court stated that a telegram had been received from Mr. R. E. Robertson, Proctor for Respondent, by which he asked permission to submit this matter by briefs. The Court, at this time, ruled that the matter would be heard on briefs and allowed 30 days for the filing of Respondent's brief; 30 days to Libelant for an answering brief, and 10 days for a reply brief if found necessary.

Monday—July 28, 1958

Upon presentation by F. O. Eastaugh, Proctor for Respondents, the Court signed the Final Decree in this cause, ordered it filed and entered.

[Title of District Court and Cause.]

CLERK'S PROOF OF SERVICE

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One thereof, do hereby certify that a certified copy of Appeal & Points on Appeal were mailed to

Robertson, Monagle & Eastaugh, Attorneys at Law,
Box 1211, Juneau, Alaska, on October 24, 1958.

[Seal] /s/ J. W. LEIVERS,
Clerk of the District Court for the District of
Alaska, Division Number One, at Ketchikan.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and all orders of the Court filed in the within cause, and constitute the record on Appeal as designated by the appellant.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled Court to be affixed at Ketchikan, Alaska, this 24th day of November, 1958.

[Seal] /s/ J. W. LEIVERS,
Clerk of the District Court for the District of
Alaska, Division Number One, at Ketchikan.

[Endorsed]: No. 16292. United States Court of Appeals for the Ninth Circuit. Jack Paul Brown, Appellant, vs. Dean Kayler, Chris Dahl d/b/a Kayler-Dahl Fish Company, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed: December 5, 1958.

Docketed: December 17, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 16,292

United States Court of Appeals
For the Ninth Circuit

JACK PAUL BROWN,

Libelant,

vs.

DEAN KAYLER, CHRIS DAHL and JOHN
DOE, d/b/a Kayler-Dahl Fish Com-
pany,

Respondent.

BRIEF OF APPELLANT.

ZIEGLER, ZIEGLER & CLOUDY,

A. H. ZIEGLER,

P. O. Box 1079, Ketchikan, Alaska,

Proctors for Libelant.

FILE

APR 13 1959

PAUL P. O'BRIEN, C.



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No. 16,292

**United States Court of Appeals
For the Ninth Circuit**

JACK PAUL BROWN,

Libelant,

VS.

DEAN KAYLER, CHRIS DAHL and JOHN
DOE, d/b/a Kayler-Dahl Fish Com-
pany,

Respondent.

BRIEF OF APPELLANT.

This suit comes before the Court on appeal from the judgment of the District Court in sustaining the exceptions of respondent and dismissing the libel.

PRELIMINARY STATEMENT.

A brief history of the case is presented in order to simplify an understanding of the issues.

Libelant was injured aboard respondent's vessel, the Homer, September 27, 1954, and sustained the serious injuries described in paragraph V of the second amended libel.

Libelant is an Indian and upon the accident engaged another Indian, an attorney named Wm. L.

Paul, Jr., to represent him. His attorney did some work on the case and prepared a complaint for damages under the Alaska two-year statute, and then abandoned his practice and departed from Alaska, whereupon libelant consulted his present proctors and engaged them to represent him. We investigated the facts surrounding the accident, made a trip to Seattle, Wash., where the barge was and took pictures of the vessel. Libelant during all the time was still undergoing medical treatment and his condition had not become definitely established for which reason it was decided to defer commencing suit as long as possible; that on September 18, 1956, suit was filed under the Alaska two-year statute; that before filing suit proctors learned from libelant that the barge Homer was owned and operated by a company known as Kayler-Dahl Fish Co., Inc.; that the complaint which had been prepared by Wm. L. Paul, Jr., named such defendant as a corporation; that before commencing the suit, however, proctors examined the Directory of Alaska Corporations, which directory listed the defendant as a corporation; that proctors relied on the information supplied them, and the directory, and brought the suit against defendant as the corporation hereinabove named; that after suit was filed, and after the expiration of two years from the date of accident, defendant filed a motion to dismiss on the ground that the corporation had been dissolved; that plaintiff in that suit could not amend by naming a new party because two years had then expired; that it then became obvious, if libelant was to have his day in court, a suit in admiralty was necessary and such suit was

filed on November 29, 1956; that exceptions were filed to the libel, based on laches, and an amended libel was then filed tending to excuse the delay in filing the suit, which exceptions were sustained by the Court; that with permission of the Court, a second amended libel was filed, to which exceptions were interposed and sustained by the Court and judgment entered dismissing the libel; that in sustaining the exceptions the Court held that respondent was prejudiced by reason of the delay in filing the second amended libel beyond the two-year statute, above mentioned.

The case is now before this Court on Points 1 and 2 listed on page 38 of the transcript which are to the effect that the Court erred in sustaining the exceptions to the libel and in entering judgment dismissing the libel.

ARGUMENT.

NATURE OF EXCEPTIONS.

While in some instances, in admiralty, the Courts in hearing exceptions consider affirmative matter, still, as a general rule, the exceptions are treated as a demurrer and all material facts set forth in the libel are admitted as being true.

The trial Court, in passing on the exceptions, apparently did consider the affirmative matter set forth in the exceptions, to the effect that libelant could have determined that the defendant against whom suit was filed under the two-year statute was not a corporation, and had been dissolved at the time of the accident, by

investigating the records of Alaska in the office of the Department of Finance at Juneau, Alaska, where such records were kept. This matter might constitute a defense. However, it should be plead in an answer where all the facts in connection therewith could be presented to the Court.

ON QUESTION OF LACHES.

We concede libelant is bound by the acts of his proctors.

If reasonable diligence was not used in filing the action under the two-year statute, and as a result thereof, respondent was prejudiced by the short delay, that is the interval of time from the date of filing suit under the two-year statute up to the time this suit in admiralty was filed, then the District Court should be upheld in dismissing the libel.

The principal argument of respondent in support of the exceptions is that libelant's proctors owed a duty to the libelant to make sure who was the proper party defendant and that they could have ascertained the true status of the defendant by checking with the office of the Department of Finance of Alaska where the records were kept. We concede that this could have been done.

However, we do feel that we were justified in believing that we had brought suit against the proper party and that we used ordinary care and diligence in order to determine the status of the defendant. We

were simply misled by the information we had before us, and by the directory upon which we relied.

If this be not true, and this Court so holds, then it would appear to us that our client would have a cause of action against his proctors for their failure to use that degree of care the circumstances required. This is the position taken by respondent and upon which it relied in urging its exceptions to the libel. In other words the alleged laches are attributable to the libelant.

The test would seem to be, if suit were instituted against libelant's proctors for failure to use ordinary care in determining the status of defendant, would this Court hold, as a matter of law, that the proctors were liable?

If so, then the District Court's judgment in allowing the exceptions and dismissing the libel was proper.

We respectfully urge upon the Court that the exactitude which must be employed in any given case should be dependent on the facts involved.

We relied on the authenticity of the Directory of Corporations we had in our office and which was used, and if we were wrong in so doing and were obligated to go further, then our client must suffer by losing his right to a day in court. That is, of course, provided respondent was prejudiced by the short delay in proceeding in admiralty.

The question then would be, was the District Court correct in holding, as a matter of law, that prejudice was presumed on account of the short delay beyond

the two-year period when the suit in admiralty was commenced.

The excuse plead in the second amended libel in failing to file the suit in admiralty within the two-year period is fully set forth. The fact is affirmatively plead that the owner of the assets of the dissolved corporation were owned by the present respondents. Unless it can be shown on a trial on the merits that other rights or interests were affected by the delay, which was very brief, or that witnesses who were available on the expiration of two years from the date of the accident were not available when the suit was filed in admiralty, then there could be no presumption of prejudice.

It was pointed out to the Court that fishing in Alaska is of a seasonal nature; that those persons engaged in such business usually leave Alaska after the fishing season and it would be possible and likely that libelant could establish upon a trial on the merits that the statute was actually tolled on account of the absence of the respondent from Alaska.

Without a trial on the merits the opportunity to do this would be lost.

In this connection, if possible, we ask this Court to permit an amendment to the second amended libel to the effect "that Libelant believes and alleges that the statute of limitation has been tolled on account of the absence of the respondent from Alaska between the date of the accident and the date the libel was filed."

Delay in commencing a suit in admiralty is not very serious or important, because if the delay is reason-

ably explained, or it is shown no prejudice has resulted from the delay, the time element in filing suit does not enter into consideration.

The decided cases contain many factual situations excusing the delay. Necessarily they all differ with respect to the facts, and there are not two cases with like facts.

The modern tendency of the Admiralty Courts is to abandon *a mechanical application of the doctrine of laches* (emphasis ours).

Judge Learned Hand, in the *Fulton* case, 54 Fed. 2d 467, 469, had this to say:

“There has been an extraordinary delay. The libel was filed more than four years after the collision, which occurred nearly ten years ago. *In spite of the absence of any explanation we cannot see the delay ipso facto should defeat the claim*” (emphasis ours).

In the *Richard W. Walker v. Benjamin Foster Company* case, 1950, 92 F. Supp. page 402, Walker filed a libel alleging he was injured on July 19, 1946. The libel was filed on May 2, 1949. Respondent filed a motion to dismiss by reason of laches and the Court ordered a dismissal unless libelant wished to amend, which libelant did. After amendment was filed respondent filed its motion to dismiss and the Court stated as follows:

“* * * Detriment to the adverse party is presumed from delay for the statutory period unless the contrary be shown. Libelant has undertaken to show the contrary, by means of the prelimi-

nary step of filing an amended libel containing the necessary allegations, pursuant to the order of the Court. At this stage of the proceedings, respondent is not in a position to preclude libelant from meeting the burden placed upon and assumed by him. No suggestion is made that the allegations of no prejudice to respondent are inadequate as a matter of law, nor may the respondent, upon exceptions, controvert those allegations. *It would make no difference if the facts pleaded in excuse of the delay were inadequate as a matter of law, as respondent urges, if it also appeared that the respondents were not prejudiced. For laches consists of inexcusable delay plus prejudice to the adverse party resulting from the the delay. If the libelant can overcome the presumption of prejudice, he will have overcome the presumption and the defense of laches.* The burden has been assumed by the libelant in his amended libel, and at the appropriate time it will be determined whether that burden has been met. The appropriate time cannot arise until a hearing has been held, after an answer, when the libelant will have the opportunity of advancing the proof of his pleadings" (emphasis ours).

Therefore, if in this case the Court determines the delay is inexcusable (which we contend should not be done) still since there is no prejudice shown, and the demurrer or exceptions having admitted the allegation of no prejudice, the exceptions should not have been sustained.

In *Gardner v. Panama R. Co.*, U. S. Reports, page 29, U. S. Court of Appeals, Fifth Circuit, the Court stated:

“Although the question of laches is one primarily addressed to the discretion of the trial Court, it should not be determined merely by a reference to and by a mechanical application of the statute of limitations; the equities of the parties must be also considered.”

It is interesting to observe that in this case, the libelant also sued the wrong party, under an apparent misapprehension. In this case the petitioner's suit in admiralty was dismissed by the District Court, and affirmed by the Court of Appeals, but was reversed by the above Court of Appeals for the Fifth Circuit.

In *Pinion, Libelant v. Mississippi Shipping Co.*, 166 Fed. Supp., No. 5, page 652, U. S. District Court case, the Court followed the rule in the *Gardner* case, and stated:

“Although a state statute of limitations may be used as a guide in admiralty, *it is not to be applied mechanically* and where it is shown that delay in filing the libel was excusable and respondent was not prejudiced by delay, the defense of laches is not successfully made” (emphasis ours).

In the case of *Louis McDaniel v. Gulf & South American Steamship Co., Inc.*, decided by the Fifth Circuit Court of Appeals, December 21, 1955, the libel was dismissed by the U. S. District Court, but reversed on appeal.

This is a very late case. It was urged by libelant that even though no inexcusable delay was shown, still if there were no prejudice shown, laches would be

overcome. While the Court did not specifically so hold, in view of the fact of finding that the delay was not inexcusable, still it is reasonable to infer that it would have followed the rule laid down in the *Walker v. Benjamin Foster* case hereinabove cited, and the decision by Judge Learned Hand in the *Fulton* case, cited above.

The general rule in cases like this one, is that the Courts are loath to decide the question of laches on exceptions; that where there is a question of fact it must be disposed of by a hearing on the merits, after an answer has been filed, where additional facts may be produced to offset the claim of laches, or additional facts may be produced in support of the libel, such as whether or not the statute has been tolled.

We wish to emphasize the fact that the trial Court ought not to have considered any affirmative matter urged by the respondent in the exceptions, because the only matter before the trial Court is the allegations of the second amended libel, which must be taken as true. The trial Court ignored the affirmative matter plead in defense of the doctrine of laches, and made a mechanical application of the doctrine and rule, holding that since the suit in admiralty was not filed within the two-year statute, prejudice was presumed.

Laches is a defense, and seldomly is passed on by exceptions, because in order to determine whether laches exist in any case, it is necessary that all the facts be before the Court.

C. H. Sprague & Son v. Howard, 68 Fed. Supp. page 348, sets forth the general rule, as follows:

“The defense of laches under the admiralty practice, as in equity, is, as a rule, properly presented only by answer and not by exception unless the libel on its face shows laches as a matter of law.”

This is a case where it is shown by the libel that the libelant has been disabled for life, due to the serious injuries he has received, which is admitted by the exceptions. It would be manifestly harsh and unjust if libelant were denied his day in court. In this connection we call attention of the Court to language used by the Court in the case of *National Oil Transport v. United States*, 18 Fed. 2d, page 35, as follows:

“Court of Admiralty, though not technically a Court of Equity, may apply equitable principles to subject matter within its jurisdiction. So broad are the powers of a Court of Admiralty, and so extensive the considerations which impel its action, that it has been called, as distinguished from a Court of law, or a Court of equity, *a Court of justice*” (emphasis ours).

CONCLUSION.

The trial Court erred in sustaining the exceptions of respondent, and entering judgment dismissing the second amended libel.

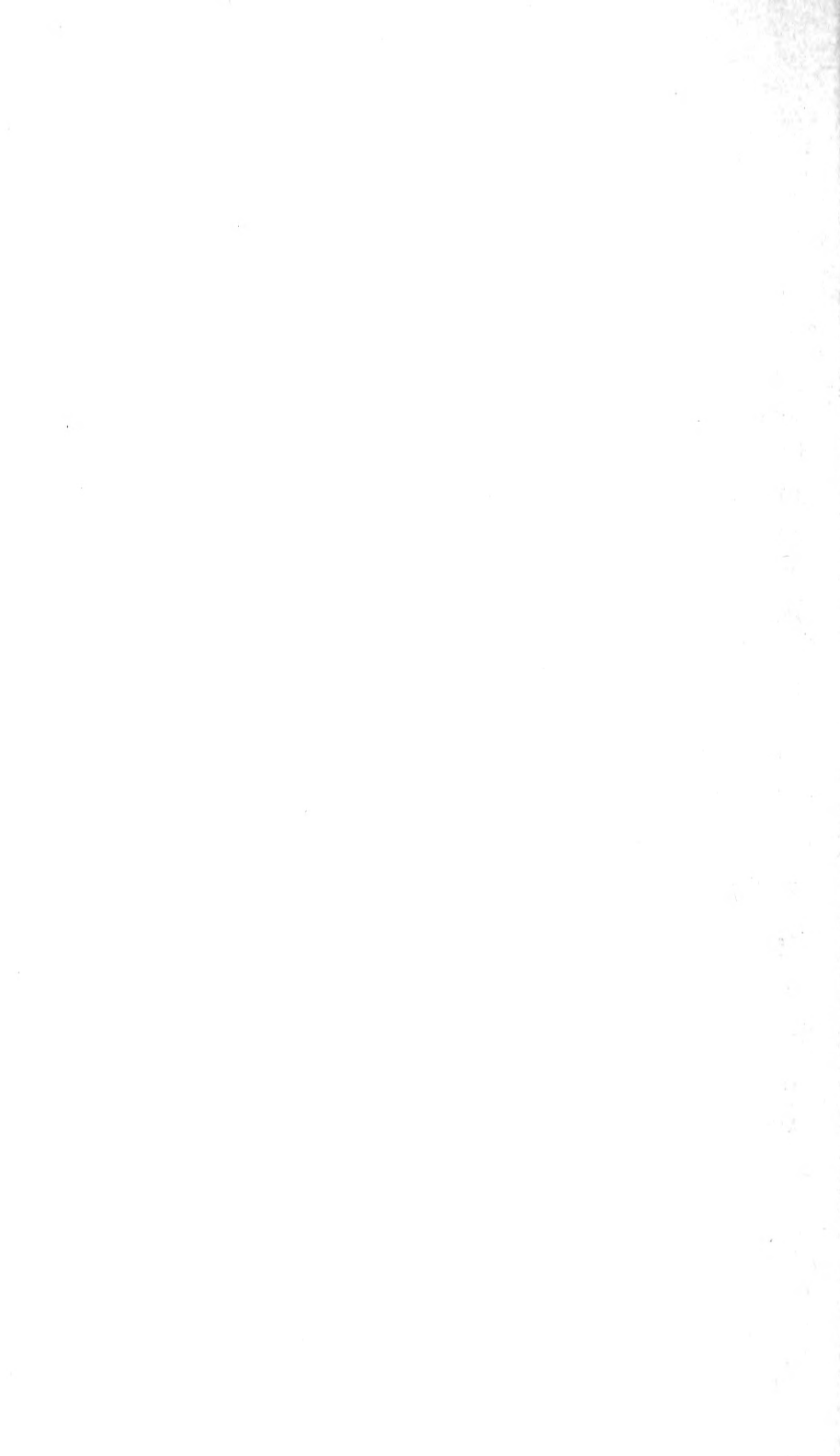
Dated, March 3, 1959.

Respectfully submitted,

ZIEGLER, ZIEGLER & CLOUDY,

By A. H. ZIEGLER,

Proctors for Libelant.



No. 16,292

United States Court of Appeals
For the Ninth Circuit

JACK PAUL BROWN,

VS.

Appellant,

DEAN KAYLER, CHRIS DAHL and JOHN
DOE, d/b/a Kayler-Dahl Fish Com-
pany,

Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF OF APPELLEES.

FREDERICK O. EASTAUGH,

RALPH E. ROBERTSON,

P. O. Box 1211, Juneau, Alaska,

Proctors for Appellees.

FILED
JUN 16 1959
PAUL F. O'BRIEN, CLERK



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No. 16,292

United States Court of Appeals For the Ninth Circuit

JACK PAUL BROWN,

Appellant,

vs.

DEAN KAYLER, CHRIS DAHL and JOHN
DOE, d/b/a Kayler-Dahl Fish Com-
pany,

Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF OF APPELLEES.

JURISDICTIONAL STATEMENT.

This suit was instituted by libellant-appellant, Jack Paul Brown, on November 29, 1956, (R. 5) to recover damages for personal injuries alleged to have been suffered in an accidental fall on respondents'-appellees' power barge HOMER on September 27, 1954 (R. 3, 4). Appellees excepted to the libel (R. 6). Appellant filed his Amended Libel on April 25, 1957 (R. 9, 13) to which appellees excepted (R. 14, 16). The exceptions were allowed by the Court's opinion (R. 16, 23) on November 6, 1957, which opinion was modified by Order (R. 23-24) dated November 7, 1957,

allowing libellant to amend. Appellant filed his Second Amended Libel (R. 24-30) on December 2, 1957 to which appellees excepted (R. 30-32). The exceptions were sustained by the Court's Opinion (R. 33-35) dated July 8, 1958 and Final Decree (R. 36-37) was entered July 28, 1958. An appeal was taken by appellant on October 24, 1958 (R. 38).

The jurisdiction of the District Court was conferred by the Act of June 6, 1900, c. 786, Sec. 4, 31 Stat. 322, as amended, 48 U.S.C.A. Sec. 101.

The jurisdiction of this Court rests on Secs. 1291 and 1294, Chapter 83, Title 28, *United States Code*, Judiciary and Judicial Procedure, and on The Act of July 7, 1958 (Public Law 85-508, 72 Stat. 348-349. Sections 12-14).

STATEMENT OF THE CASE.

Appellant's Preliminary Statement may be a combination of the statement of pleadings and statement of the case required by this Court's Rule 18, subdivisions 2 (a) and (b). The presentation of appellant's case has made it difficult for appellees to determine the points they are obliged to meet. Hence this statement will include a specification of grounds warranting dismissal of appellant's appeal.

Grounds Warranting Dismissal.

1. Appellant's Points on Appeal (R. 38) merely state that the district court erred in sustaining the exceptions and entering judgment dismissing the libel.

These points present nothing for review. *Woodbury v. Clermont*, 9 Cir., 1956, 236 F.2d 132.

2. Appellant's Brief contains no allegations of jurisdiction as required by Rule 18, subdivision 2 (b) (1), which omission, while it may not be grounds for dismissal, is at least good grounds for reprinting of the brief. *Credit Bureau of San Diego v. Petrasich*, 9 Cir., 1938, 97 F.2d 65.

3. Appellant's Brief contains no statement of the case as required by Rule 18, subdivision 2 (c), unless the Preliminary Statement is so construed. *Thys Company v. Anglo California National Bank*, 9 Cir., 219 F.2d 131.

4. Appellant's Brief contains no specification of errors setting out separately and particularly each error intended to be urged, as required by Rule 18, subdivision 2 (d). *Lowe v. McDonald*, 9 Cir., 1955, 221 F.2d 228; *Anderson v. United States*, 9 Cir., 1955, 218 F.2d 780; *Peck v. Shell Oil Co., Inc.*, 9 Cir., 1944, 142 F.2d 141; *Reynolds v. Lentz*, 9 Cir., 1957, 243 F.2d 589.

Inasmuch as the purposes of the requirements are to conserve the time and energy of the court and to clearly advise the opposite party of the points he is obliged to meet, appellees move and submit that appellant's appeal should be dismissed.

Appellees' Statement.

Appellant's statement is controverted as follows:

All of the purported facts contained in appellant's preliminary statement are either allegations of the

several libels, representations made to the court below during argument on the exceptions, either orally or submitted by brief, or statements presented here for the first time.

That William L. Paul, Jr., appellant's first counsel (R. 28), is an Indian does not appear in the record and the materiality of such fact, if true, is doubtful inasmuch as he was then, and is probably now, duly admitted to practice before the court below and this Court.

That before filing the first suit on September 18, 1956 (R. 19), appellant's proctors did not *learn* from appellant that the HOMER was owned and operated by the corporation, which corporation in fact was not in existence at that time (R. 32), having been dissolved on July 2, 1952 and stricken from the Alaska corporation records September 26, 1952, but were *told* (R. 11) by appellant of the latter's belief in that regard.

That appellees' exceptions to the libels were not only based on the grounds of laches, as asserted by appellant (Brief, p. 3), but also on the additional grounds specified in appellees' exceptions (R. 14-16, 30-32) and which have not been abandoned by appellees.

That in sustaining the exceptions the court below did not hold that the appellees were prejudiced by the delay, as asserted by appellant (Brief, p. 3), because the court below sustained the exceptions on the ground of laches for the reasons stated in the Opinions of the District Court (R. 22-23, 33-35).

Therefore this case is now before this Court, if at all in view of appellant's failure to comply with the rules of this Court in the four respects specified above, on the simple issue of whether or not the facts pleaded in the Amended Libel and Second Amended Libel were sufficient to show excusable delay on the part of the appellant and no prejudice to appellees arising out of that delay.

SUMMARY OF THE ARGUMENT.

1. The District Court did not hold that appellees were prejudiced by appellant's delay in filing the libel.

2. Laches in admiralty is the application of the equitable doctrine that unreasonable delay in bringing suit precludes relief.

3. Laches appearing on the face of a libel may be properly raised by exceptions.

4. The Court may consider exceptive allegations in testing the sufficiency of a libel where laches appears on its face.

5. The burden is upon appellant to allege facts sufficient to overcome the presumption of prejudice where laches appears on the face of the libel.

6. There are no facts before this Court upon which to base an amendment pleading a tolling of the analogous statute of limitations.

7. Appellant is bound by the acts of his proctors.

8. The libels plead no facts which raise equitable excuses for delay, or other exceptional circumstances,

sufficient to raise the bar of the analogous statute of limitations.

ARGUMENT.

Due to the difficulty imposed upon appellees of answering a brief lacking specifications of error, the following argument must necessarily be predicated upon appellees' belief as to what points appellant intended to raise and urge, and is therefore undoubtedly longer than would otherwise have been the case.

1. THE DISTRICT COURT DID NOT HOLD THAT APPELLEES WERE PREJUDICED BY APPELLANT'S DELAY IN FILING THE LIBEL.

Of the excuses presented for the delay of appellant in instituting the action the court below stated:

“... that the excuses presented for the laches of libelant in failure to bring the action within the two-year period are insufficient reasons in law or equity.” (R. 21-22)

“None of the excuses or reasons for delay are sufficient to overcome the presumption of prejudice to respondent.” (R. 23)

“None of these reasons present a condition which proper diligence could not have avoided.”

“A careful reading of the second amended libel does not disclose to this Court any facts pleaded, which, if proven, would be sufficient to excuse the delay in filing this action, nor does it disclose any new facts which, if proven on the trial, would

overcome the presumption of prejudice which exists as set forth in the former opinion herein.” (R. 33)

“None of the matters stated in the second amended libel is sufficient to excuse libelant’s failure to file his libel within the period allowed by the statute of limitations, and no facts are pleaded therein which would overcome the presumption of prejudice cloaking the respondents.” (R. 35)

Appellant contends that the reasons for delay are immaterial if in fact the appellees were not prejudiced by the delay, and cites *Walker v. Foster*, D.C.E.D. Pa., 1950, 92 F. Supp. 402 as authority. However, the *Walker* case has no application here for it is also authority for the requirement that the libellant must first overcome the presumption of prejudice. And there the libel had been found insufficient and permission to amend was granted. Judge McGranery then found that the amended libel undertook the burden imposed on the libellant and pleaded facts sufficient to warrant trial, in the following language:

“... it is incumbent upon the libellant to plead and prove facts negating laches or the tolling of the statute. Detriment to the adverse party is presumed from delay for the statutory period unless the contrary be shown. Libellant has undertaken to show the contrary, by means of the preliminary step of filing an amended complaint containing the necessary allegations, pursuant to the order of the Court.”

So in the *Walker* case the district court found that the amended libel met the burden, whereas in the

present case the district court found that the allegations did not do so as a matter of law. The *Walker* case has had judicial notice. Of it Judge Dimock, in *Tesoriero v. A/S Ludwig Mowinckels Rederi*, D.C. S.D. N.Y., 1953, 113 F. Supp. 544, 546, fn 4, stated:

“As I read *Walker v. Benjamin Foster Co., Inc.*, D.C.E.D. Pa., 92 F. Supp. 402, cited by libellant, it appears that the court was satisfied that sufficient facts were pleaded to negative laches.”

Appellant's contention cannot be supported by any case known to appellees.

Appellant has referred to the short delay (R. 5) of some two months in bringing the libel, but has omitted reference to the additional delay of five months in filing the amended libel and of seven additional months in filing the second amended libel.

Appellees therefore submit that appellant's contention and view of the district court's finding are incorrect. The decree dismissing the libel was based on the failure of the libels to allege facts sufficient to constitute a valid and equitable reason for the delay in filing the libel beyond the period of the analogous statute of limitations.

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2. **LACHES IN ADMIRALTY IS THE APPLICATION OF THE EQUITABLE DOCTRINE THAT UNREASONABLE DELAY IN BRINGING SUIT PRECLUDES EQUITABLE RELIEF.**

Apart from Acts of Congress requiring that particular actions be commenced within a fixed time, there

is no statute of limitations for civil suits in admiralty. In the exercise of their equitable powers the admiralty courts have frequently followed the analogy of the state statute of limitations to determine whether the claim has been barred by inexcusable delay constituting laches. *Benedict, Admiralty*, 6th Ed., Vol. 3, pp. 293, 294.

The rule of laches is applied in admiralty cases by the federal courts of the Ninth Circuit. *The Kermit*, 9 Cir., 76 F.2d 363, 367, certiorari denied *Lamborn v. American Ship & Commerce Nav. Corporation*, 296 U.S. 581, 56 S. Ct. 93, 80 L.Ed. 411.

In determining the question of laches a court of admiralty will be governed by analogy of the state statute of limitations covering actions of the nature disclosed by the libel, in the absence of exceptional circumstances constituting equitable reasons for not barring the action. *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.*, 9 Cir., 73 F.2d 200, 203; *Morales v. Moore-McCormack Lines, Inc.*, 5 Cir., 1953, 208 F. 2d 218; *Claussen v. Mene Grande Oil Company*, D.C. Del., 1958, 163 F. Supp. 779.

In Alaska the statute of limitations governing the time in which actions for personal injuries may be instituted is Section 55-2-7, ACLA 1949, and provides a two year period in which such actions may be commenced.

While the courts are not strictly bound by the analogy they are mindful of the reasons of public policy and equity inherent in the establishment of statutes of

limitations. Judge Kelly had these reasons in mind in writing his first Opinion (R. 22). Inherent in the application of the analogy is the doctrine of equity which gives the court discretion to invoke the bar of laches. Equity frowns on stale claims, and unreasonable delay in bringing suit precludes relief. Reasonable diligence is a prerequisite to invoking the court's aid in the assertion of one's rights. *Whitman v. Walt Disney Productions*, D.C.S.D. Cal., 1957, 148 F. Supp. 37; *Gillons v. Shell Co. of California*, 9 Cir., 1936, 86 F. 2d 600.

Appellant has pleaded his ignorance of the law and in the same breath argues that the information and belief of appellant was good reason for not determining from authoritative sources the status of the respondents from whom appellant seeks some \$50,000 in damages. And this reliance was so placed under the circumstances where the deadline was approaching for instituting suit for reasons best known to appellant but which apparently included the motive of attempting to magnify the personal injuries claimed, or possibly, mitigation or lessening of damages through recovery of the appellant.

In any event appellees submit that no equitable reason for the delay was presented, nor any exceptional circumstances which would justify raising the bar of laches, and the court below so held.

3. LACHES APPEARING ON THE FACE OF A LIBEL MAY BE PROPERLY RAISED BY EXCEPTIONS.

Appellant's first point on the nature of the exceptions (Brief, p. 3) appears to state the proposition that the allegations of the libels must stand admitted as pleaded and can only be controverted or attacked upon trial. Carrying this proposition forward to its ultimate conclusion would be equivalent to asserting that a libel cannot be tested preliminarily for sufficiency by exceptions.

It is well settled that where the averments of the libel disclose on its face the fact of the staleness of the demand the objection to the delay may be raised by exception. 175 ALR 369; *U.S. Shipping Board Emergency Corp. v. Rosenberg Bros. & Co.*, 276 U.S. 202, 214, 72 L.Ed. 531; *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.*, supra; *The Sydfold*, 2 Cir., 1936, 86 F.2d 611; *Independent Transp. Co. v. Canton Insur. Office*, 173 F. 564; *Stampalia v. Murphy*, D.C. E.D. Pa., 1929, 34 F.2d 660; *The Vema*, 27 F. Supp. 679; *Marshall v. International Mercantile Marine Co.*, 2 Cir., 1930, 39 F.2d 551.

4. THE COURT MAY CONSIDER EXCEPTIVE ALLEGATIONS IN TESTING THE SUFFICIENCY OF A LIBEL WHERE LACHES APPEARS ON ITS FACE.

Appellant's argument on the nature of the exceptions (Brief, p. 3), appears to state the proposition that either the court below could not consider or should not have considered, affirmative matter contained in the exceptions for the purpose of contro-

verting the allegations of the libels attempting to negative laches; and, that consequently the allegations of the libel should stand until proved otherwise on trial.

Appellees do not support "trial by affidavits" and concede that preliminary determination of a cause, except upon the merits, is not a favored procedure. Yet there is good reason for the admiralty courts to have the power and discretion to dismiss a libel on a preliminary determination where it appears as in this case, that upon trial none of the facts pleaded if proved would, as a matter of law, excuse the laches appearing on the face of the libel.

And in this regard, as courts of equity, the admiralty courts have been held to have all of the powers of the civil courts.

In the case of *Infante v. Moore-McCormack Lines, Inc.*, D.C.E.D. Pa., 1950, 93 F. Supp. 239, the libel of a passenger against the agent of the owner of a ship was dismissed over the libellant's protests that dismissals in the nature of summary judgments were not permitted by the Admiralty Rules, and only permitted under Admiralty Rule 38 for the reasons therein specified. The Court held that the rules do not limit the power of the Courts in Admiralty for they traditionally have had all of the powers of the civil courts. And on the authority of the *Infante* case the District Court in *Longbottom v. American Dredging Company*, 159 F. Supp. 296, granted partial summary judgment to libellant pursuant to Rule 56 (d), F.R.C.P.

In *Dowling v. Isthmian S.S. Corporation*, 3 Cir., 1950, 184 F.2d 758, Judge Fee indicated the consider-

able latitude inherent in the powers of the admiralty courts in rulings on practice and procedure not involving enlargement or restriction of the court's jurisdiction or the substantive law.

Therefore it appears that appellant's contention would unduly limit the equitable powers of the admiralty courts, and there appears to be ample authority that such is not the case. And to the contrary it appears that the admiralty courts not only have wide powers of equitable discretion but they may use any of the procedures provided for in the Federal Rules of Civil Procedure.

In this respect *Walle v. Dallett*, D.C. N.Y. 1955, 135 F. Supp. 390, is of interest because there, although the exceptions were not sustained, in part because the libellant alleged she had secured her rights under applicable statute by filing a claim with the proper federal bureau, the exceptions were treated by the District Court as in the nature of a motion for summary judgment under Rule 56, F.R.C.P., 28 U.S.C.A.

And similarly, Rule 12 (b) F.R.C.P., 28 U.S.C.A., states in part that if on a motion to dismiss for failure to state a claim upon which relief can be granted, as appellees did (R. 14, 31), matters outside the pleading are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment and be disposed of as provided in Rule 56, *supra*.

In reviewing the facts alleged by the appellant to excuse the delay it is to be remembered that the facts bearing on the issue of laches are wholly within the appellant's knowledge, and that trial of the case would

not, nor could, add to it. Nothing in the knowledge of the opposing party could add to the truth of the matter. Therefore it must be assumed that appellant, in controlling the allegations asserted to negative laches, put his best foot forward. Especially in the present case where the deficiencies of the Amended Libel were pointed out in the first Opinion (R. 23) of the District Court and appellant was given the opportunity to amend, which he did. *Dixon v. American Telephone & Telegraph Co.*, 2 Cir., 1947, 159 F.2d 863.

However, despite the incentive to urge the most compelling reasons to negative laches, appellant has obviously not presented to the court below all that was in his power to present. He did not state *when* his first attorney abandoned his practice and departed from Alaska, nor *when* he consulted his present proctors, nor *when* the first complaint was originally prepared by his first attorney, nor *when* it was delivered to his present proctors, nor did he give the *publication date* of the directory of Alaska corporations which listed the defendant corporation named in the first suit. All of this information which is pertinent to the issue of laches was peculiarly within the knowledge of the appellant.

In view of all of the circumstances appellees deemed that exceptive allegations would be an aid to the court below in determining the sufficiency of the facts alleged to negative laches. The propriety of such submissions where the facts showing the staleness of the claim appears on the face of the libel is well settled. *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.*, *supra*.

Courts of admiralty, in the exercise of their wide powers of discretion, have resorted to information contained in affidavits even where the libel is sufficient on its face to show that the respondent was neither the ship-owner nor the employer of the injured seaman. *Theriot v. Atlantic Refining Co.*, D.C.E.D. Pa., 1950, 91 F. Supp. 856.

As to the propriety of presenting to the court the fact that a claim is stale, in *The Seminole*, D.C.E.D. N.Y., 1890, 42 F. 924, 925, the court said:

“But the case is now before the court upon exceptions, and the facts above referred to as judicially known to the court do not appear in the libel. I do not see, therefore, how, upon the exceptions alone, as they stand, the libel can be dismissed. I am, however, of the opinion that a claimant may, in an exceptive allegation attached to exceptions, bring before the court facts judicially known to the court.”

Proper use of exceptive allegations is limited to matters of fact of which the court may take judicial notice. 2 CJS 250, Admiralty, Sec. 124 (1); *The Vol-sinio*, 32 F.2d 357; *North American Smelting Co. v. Moller S.S. Co.*, D.C. Pa., 1950, 95 F. Supp. 71; *U. S. Shipping Board Emergency Fleet Corp. v. Rosenberg Bros. & Co.*, supra.

Exceptive allegations have long been sanctioned for use in the admiralty courts, although there is no basis for them in either statute or rule. The necessity of reasonable use of such allegations and their limitation to matters of which the court may take judicial

knowledge is described in *Suspine v. Compania Transatlantic*, D.C. N.Y., 1940, 37 F. Supp. 263.

The affirmative material, objected to by appellant but not disputed or denied, consists of allegations of the contents of public records of the federal and territorial governments of which the court below could take judicial notice. 31 CJS 517, Evidence, Sec. 12, fn 10, 11. Such records pertain to the question of whether or not appellant was diligent in pursuing his remedy. However, this justification of the well established principle of admiralty law that exceptive allegations may bring to the court matters of which it may take judicial notice, and in the discretion of the court other matters as well, may be entirely immaterial in view of the fact that there is no indication whatsoever that the court below considered this affirmative matter at all in reaching its decision that the allegations contained in the libels were not sufficient as a matter of law to excuse the delay and permit the tardy action.

And it finally appears that such attempts to limit the powers of discretion of the court below have been previously described in the *Infante* case, *supra*, as follows:

“Merely to state the proposition that the court is without power to preliminarily determine that question and upon finding against the libellant to dismiss the libel is to manifest its absurdity. It would be pure sham to allow the matter to proceed to trial and then after trial to accomplish the same result as has already been accomplished by the Order of Dismissal.”

5. THE BURDEN IS UPON APPELLANT TO ALLEGE FACTS SUFFICIENT TO OVERCOME THE PRESUMPTION OF PREJUDICE WHERE LACHES APPEARS ON THE FACE OF THE LIBEL.

Appellant seems to contend that even if the facts pleaded to excuse the delay are found insufficient the appellant may rely upon his allegations of the Amended Libel (R. 12-13) and Second Amended Libel (R. 29) as establishing that there was no prejudice shown against appellees, and that accordingly and as a consequence the exceptions should not have been sustained.

Appellant's view of the law on this point is perhaps more easily understood by examination of appellant's argument (Brief, p. 7) that "if the delay is reasonably explained, *or* it is shown no prejudice has resulted from the delay . . .". Clearly appellant contends that the connection of delay and prejudice in the laches formula is in the alternative. Appellees submit that the connection is in the conjunctive. The formula of laches may be stated as being comprised of delay *and* prejudice.

Thus appellant contends that even if the facts pleaded to negative inexcusable delay are deemed insufficient, then the bare allegation of the legal conclusion of no prejudice to appellees is sufficient to excuse appellees' contention of laches.

Appellees submit that this is not the law and have found no case which disregards the doctrine of presumption of prejudice, which is the basis for all statutes of limitations. To the contrary, it is well settled that when the libel discloses on its face that the

suit was not instituted within the period allowed by the analogous statute of limitations, that the libellant assumes the burden to plead and prove facts negating laches. *Wilson v. Northwest Marine Iron Works*, 9 Cir., 1954, 212 F.2d 510, 511; *Morales v. Moore-McCormack Lines*, supra; *Redman v. United States*, 2 Cir., 1949, 176 F.2d 713; *The Sydfold*, supra. And it is equally well settled that laches is comprised of two elements, one being inexcusable delay and the other prejudice to the respondent resulting from that delay; and, where there is delay in instituting suit beyond the period allowed by the analogous statute of limitations there is a presumption of prejudice arising from that delay. *Redman v. U. S.*, supra; *The Sydfold*, supra; *McGrath v. Panama R. Co.*, 5 Cir., 298 F. 303; *Kane v. Union of Soviet Socialist Republics*, D.C.E.D. Pa., 1950, 89 F. Supp. 435, 436.

Appellant's contention is untenable for it would dispose of the first requirement of one who would institute a tardy action, namely, *having* and *pleading* an equitable excuse or special circumstances that would overcome the inequity of setting aside the analogous statutory period. If appellant had and pleaded equitable excuse this matter would have proceeded to trial, the presumption of prejudice having been removed for that purpose, and the element of prejudice in the laches formula, along with the element of delay, would have been reserved as a defense to be proved or disapproved on trial. But the fact remains, as appellees submit, that appellant has not pleaded equitable excuse as the court below determined. It is for this reason that the presumption of

prejudice remains as Judge Kelly stated in his Opinion (R. 33).

In the *Kane* case, supra, Judge McGranery discussed the difficulties of a libellant under the presumption of prejudice, and at page 436 stated:

“It must be conceded that the libellant’s position under the presumption, is a difficult one, but the difficulty flows from his own inexcusable delay. If the presumption has the practical effect of emphasizing delay and the deemphasizing prejudice in the laches formula, then it must be taken as the judgment of the court that the facts of the case warrant such a treatment. But, in any event, it cannot be said that the presumption is an unreasonable one.”

In the foregoing case, as in *The Sydfold*, supra, and many others, the libellant was permitted to amend. However, in the case before this Court the court below permitted appellant to amend twice.

Appellees submit, as the court below found, that appellant has not met the burden imposed upon him.

6. **THERE ARE NO FACTS BEFORE THIS COURT UPON WHICH TO BASE AN AMENDMENT PLEADING A TOLLING OF THE ANALOGOUS STATUTE OF LIMITATIONS.**

Appellant now suggests (Brief, p. 6), that if the decree of dismissal were reversed and the case permitted to go to trial that it would be *possible* and *likely* that appellant could establish that the statute of limitations was actually tolled on account of the absence of *respondent* from Alaska. A similar state-

ment was presented to the court below in appellant's last written brief.

Hence it is clear that appellant's position in this regard was brought to the attention of the court below although not pleaded. Such a situation was reviewed in *Morales v. Moore-McCormack Lines*, supra, where it appeared that libellants did not plead facts negating laches, but presented them to the court in their brief, and the district judge, giving full consideration to their statements of the facts relied upon by them to excuse the failure to bring the action within the statutory period, correctly concluded that these facts did not excuse the delay.

The question of whether the statute is tolled does not appear to be strictly a part of the formula of laches, although some courts have referred to the necessity of libellant alleging facts sufficient to "negative laches and the tolling of the statute", because admiralty courts are not bound to a mechanical application of the analogous statute of limitations as appellant correctly contends. It would seem that if the statute were tolled that there would be no situation to which the doctrine of laches could be applied.

And although the point was raised in the court below, and in this Court, it also appears that appellant has not presented any facts to either this Court or the court below which would warrant serious consideration of appellant's contention.

Also, appellees submit that the contention has no merit because it is well settled that even in the absence of the persons of the appellees a proceeding in

personam in admiralty could be instituted against appellees by writ of foreign attachment where appellees had property within the jurisdiction. Admiralty Rule 2, 28 U.S.C.A.; *Brown v. C. D. Mallory & Co.*, 3 Cir., 122 F.2d 98; *Claussen v. Mene Grande Oil Co.*, supra; *Puget Sound Tug and Barge Co. v. The Go Getter*, D.C. Oregon, 1952, 106 F. Supp. 492, 493.

Appellant cannot contend or allege that appellees did not have property within Alaska, at all material times since the alleged accident of September 27, 1954, and it is probably significant that in urging an opportunity to prove the tolling of the statute of limitations that appellant does not allege any facts that would support his contention.

7. APPELLANT IS BOUND BY THE ACTS OF HIS PROCTORS.

Libellant admits (Brief, p. 4) he is bound by the acts of his proctors, yet seemingly argues that it would be inequitable to so permit.

However, that it may have been libellant's proctor and not libellant personally who was responsible for his delay does not excuse libellant's laches. *Redman v. United States*, supra.

In *McGrath v. Panama R. Co.*, supra, the mistake of libellant's counsel in advising that the three year statute was applicable was held not to justify the admiralty court in departing from the applicable one year statute of limitation and the libel was dismissed al-

though filed only 40 days after the running of the statute.

In *Marshall v. International Mercantile Marine Co.*, supra, the Per Curiam decision of Judges Swan, Augustus Hand and Chase read in part:

“If the appellant had any rights which have been lost through the conduct of her attorneys, we do not think the neglect of attorneys a sufficient reason to justify a departure from the analogy of the statute of limitations where the presumption of detriment has not been overcome.”

Appellees have never contended and do not contend here, despite appellant's arguments, any position with respect to the relations between appellant and his proctors.

8. **THE LIBELS PLEAD NO FACTS WHICH RAISE EQUITABLE EXCUSES FOR DELAY, OR OTHER EXCEPTIONAL CIRCUMSTANCES, SUFFICIENT TO RAISE THE BAR OF THE ANALOGOUS STATUTE OF LIMITATIONS.**

Appellant seeks to overcome the finding of the court below (R. 33) by the reference to several authorities in support of the proposition that there should not be here a mechanical application of the doctrine of laches.

The Fulton, 54 F.2d 467, 469, is cited seemingly to imply that laches will not bar a claim, and possibly that no explanation of delay need be shown. However brief the opinion in that court may have been, this

case was first reported at 43 F.2d 585, and there the court stated the true reason why the bar of the statute was not raised:

“There was a plausible excuse for the delay in the protracted negotiations to effect settlement.”

In thus speaking of the facts leading up to the institution of the suit, it is apparent that an equitable estoppel was created by the acts of negotiation between the parties which estopped the respondents from raising the bar of the analogous statute of limitations. There is no such situation in the present case.

Walker v. Foster, supra, is seemingly cited to support appellant's claim that the Second Amended Libel in this case overcomes the presumption of prejudice, but as above stated, appellees submit that the real reason for refusing to dismiss the amended libel was because therein libellant had undertaken to assume the burden of alleging facts sufficient to satisfy the court.

And in *Gardner v. Panama R. Co.*, 342 U.S. 29, 30, 72 S. Ct. 12, 13, 96 L.Ed. 31, the Court of Appeals for the Fifth Circuit was reversed for the equitable reason that petitioner had exhibited extraordinary diligence in pursuing her remedy. She brought two actions within one year of the accident, within the one year period allowed by the Canal Zone statute, and the second action was abated by Act of Congress through no fault of petitioner. The third action was instituted within five days after the second one was dismissed. The Supreme Court found in effect a balance of

equities in favor of the petitioner created to a large extent by her diligence, and also the consideration that to hold otherwise would have attributed to Congress the intent that for the year prior to the enactment of the amendment to the Federal Tort Claims Act one of its agencies would have been immune from suits for its negligence. Appellees submit that the *Gardner* case is no precedent for the circumstances presented here.

As to *Pinion v. Mississippi Shipping Co.*, D.C.E.D. La., 1957, 156 F. Supp. 652, cited by appellant, appellees submit that the fact situation found there has no application here. There the libel was filed just seventeen days after the one year statute of limitations had run, and the court found that the delay was completely excusable because the employer had by the payment of workmen's compensation insurance sought to keep the libellant satisfied until the statutory period had run. Another equitable estoppel.

Libellant also relies on *McDaniel v. Gulf & Southern Steamship Co.*, 5 Cir., 1955, 228 F.2d 189, wherein the dismissal of the libel by the District Court was reversed on appeal. There it was held that the averments of the libel as to the injuries which caused permanent damage to libellant's brain and thereby producing defective memory, emotional instability and incapacity to reason coherently, including a total inability to recall or relate any of the facts or circumstances of the injury, justified the finding that the delay of 2½ years was not inexcusable. In the present case it does not appear that appellant was so seriously injured that he could not employ an attorney almost

immediately after the accident, and thereafter his present proctors.

Appellees agree that the rule stated in *C. H. Sprague & Son Co. v. Howard*, D.C. N.J., 1946, 68 F. Supp. 348, is correct, but submit that it has no application here where the libel shows laches on its face, and therefore laches as a matter of law in the absence of a sufficient showing of facts negating laches.

Appellees also agree with the principles cited by appellant under *National Oil Transport v. United States*, 18 F.2d 305, but submit that the case favors appellees, for upon considering the testimony of the corporate libellant's secretary the Court, acting under equitable principles and administering the highest form of equity, dismissed the libel at libellant's cost.

Hence in all of the cases cited by appellant it appears that there were some equitable reasons for not applying the bar of laches. In *The Fulton* there were protracted negotiations for settlement. In *McDaniel* there was a mental condition caused by the accident sufficient to toll the limitations. In *Gardner* there was the extraordinary diligence exhibited by the libellant. In *Walker* the burden had simply been assumed. In *Pinion* there was an equitable estoppel sufficient to toll the statute.

And on the other hand there are the cases where the following excuses were held not sufficient. Awaiting the result of a similar case in another jurisdiction in *Davis v. Smokeless Fuel Co.*, 2 Cir., 196 F. 753, 755, 756 cert. denied 229 U.S. 617, 33 S. Ct. 777, 57 L.Ed. 1353. Awaiting settlement of litigation in the state

court to commence libel for the whole damage suffered, in *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.*, supra. The tug owners' threat to discharge a tugmaster should he bring suit, from which the tugmaster got the impression he would have steady work, was held to be no excuse in *Delpy v. Crowley Launch & Tugboat*, 9 Cir., 1938, 99 F.2d 36. Four years unexplained delay of the proctor in bringing suit was held to be no excuse in *Wilson v. Northwest Marine Iron Works*, supra.

In summation, it may be fairly said that the question of laches is addressed to the sound discretion of the trial judge, and his decision will not be disturbed on appeal unless it is so clearly wrong as to amount to an abuse of discretion. *The Kermit*, supra; *Morales v. Moore-McCormack Lines, Inc.*, supra.

CONCLUSION.

The judgment and decree of the District Court should be affirmed.

Dated, Juneau, Alaska,
May 12, 1959.

Respectfully submitted,

FREDERICK O. EASTAUGH,

RALPH E. ROBERTSON,

Proctors for Appellees.

No. 16,292

**United States Court of Appeals
For the Ninth Circuit**

JACK PAUL BROWN,

Appellant,

vs.

DEAN KAYLER, CHRIS DAHL and JOHN
DOE, d/b/a Kayler-Dahl Fish Com-
pany,

Appellees.

**Upon Appeal from the District Court for the
District of Alaska, First Division.**

REPLY BRIEF OF APPELLANT.

ZIEGLER, ZIEGLER & CLOUDY,

P. O. Box 1079, Ketchikan, Alaska,

Proctors for Appellant.

FILED

AUG 10 1959

PAUL P. O'BRIEN, CLERK

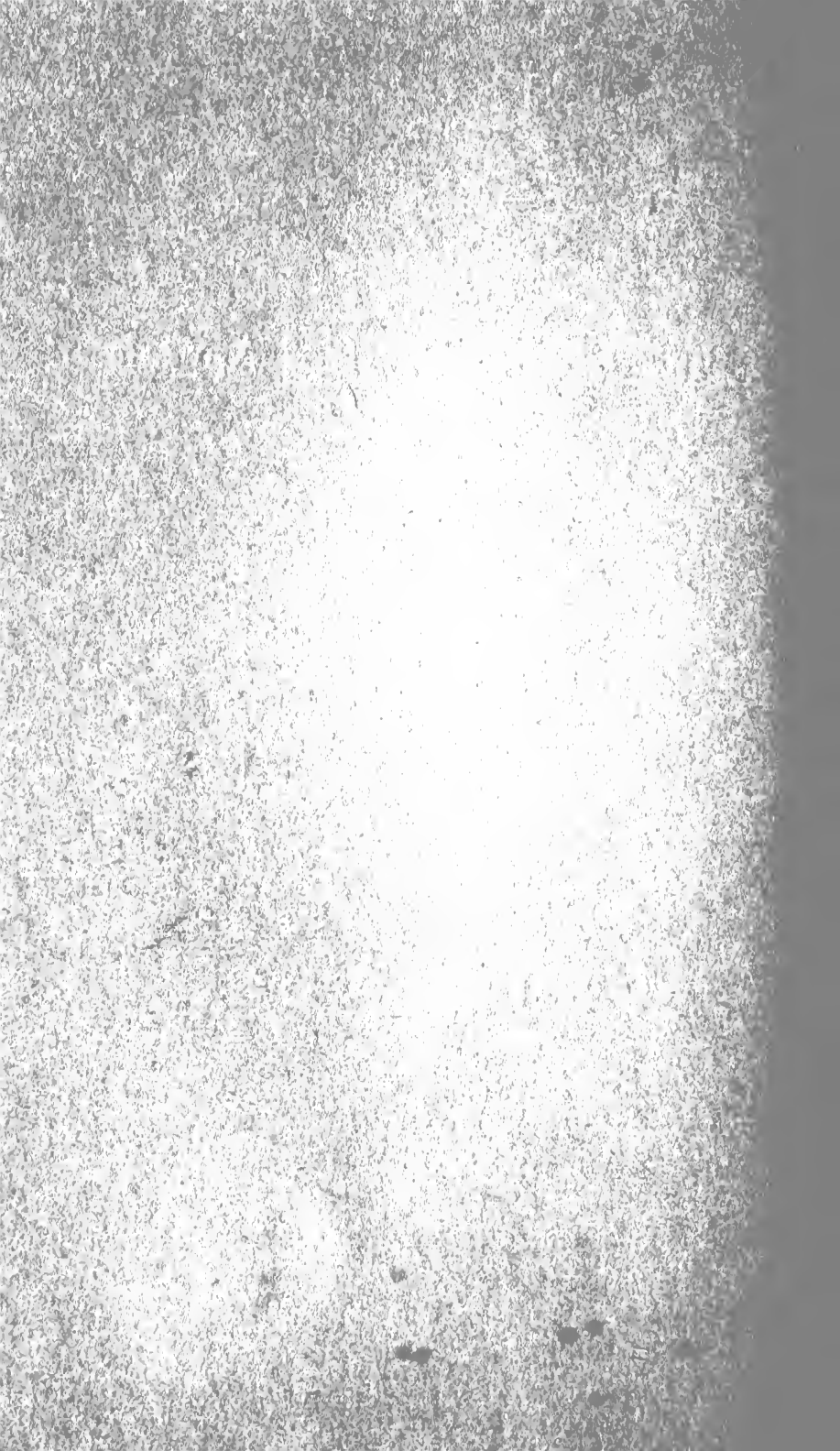


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No. 16,292

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JACK PAUL BROWN,

Appellant,

vs.

DEAN KAYLER, CHRIS DAHL and JOHN
DOE, d/b/a Kayler-Dahl Fish Com-
pany,

Appellees.

**Upon Appeal from the District Court for the
District of Alaska, First Division.**

REPLY BRIEF OF APPELLANT.

Appellees, in their brief, pages 2 and 3, list reasons claimed to warrant dismissal of this appeal.

Paragraphs 1 and 4 under heading Grounds Warranting Dismissal, pages 2 and 3 of their brief, raises the question of the sufficiency of the specifications of error.

Brief of Appellant, page 3, states:

“The case is now before this Court on Points 1 and 2 listed on page 38 of the Transcript which are to the effect that the Court erred in sustaining

the exceptions to the libel and in entering judgment dismissing the libel”

We take the position that the action of the lower Court in sustaining the exceptions to the second amended libel, and in entering judgment dismissing same, is in the nature of judgment on the pleadings.

“Where the Court has rendered judgment on the pleadings for either party, an assignment of error, stating generally that the Court erred in rendering judgment on the pleadings is sufficient”.

Klink et al. v. Chicago R. I. & P. Ry. Co., 219 Fed. Reporter, page 457.

Paragraph 2, page 3, appellees’ brief, points out failure of appellant in his brief, to show jurisdiction in this Court as required by Rule 18, Subdivision 2 (b) (1). We adopt appellees’ statement as to jurisdiction on page 2 of their brief, reading as follows:

“The jurisdiction of this Court rests on Secs. 1291 and 1294, Chapter 83, Title 28, United States Code, Judiciary and Judicial Procedure, and on the Act of July 7, 1958 (Public Law 85-508, 72 Stat. 348-349, Sections 12-14).”

Paragraph 3, page 3, appellees’ brief, contends the brief of appellant contains no statement of the case as required by Rule 18, Subdivision 2 (c), unless the Preliminary Statement is so construed. We contend it should be so construed. It is conceded it would have been more appropriate to have entitled the Preliminary Statement as “Statement of the Case”.

It is true and we concede that failure to comply with the Rules of this Court creates ground for dismissal of the appeal. However, the Rules are not strictly enforced, especially where in a case of this simple nature, there is but one error claimed.

In most if not all the cases cited in paragraph 4, page 3 of appellees' brief, decided by this Court, the appeals were not disposed of on account of failure of appellant to comply with the rules with respect to specifications of error.

This case is before the Court on the simple issue of whether or not the facts pleaded in the Second Amended Libel were sufficient to show excusable delay on the part of appellant and no prejudice to appellees arising out of that delay.

We would not have filed a Reply Brief, had not appellees in their brief, pages 2 and 3, for the reasons stated, urged dismissal of the appeal, because we feel that the parties have clearly stated their positions with respect to the facts and law involved in this appeal.

CONCLUSION.

Suit on this claim was commenced within the two year Alaska Statute.

For the reasons set forth in the Second Amended Libel that suit was dismissed.

As a result, if appellant was to have a day in Court, suit in Admiralty became the only remedy.

Such suit was promptly instituted.

If ownership of the assets of the dissolved corporation was merely changed from a corporate to an individual status, there could be no intervening interest or rights affected by the delay.

The facts pleaded, if established on a trial, would defeat the presumption of prejudice, and excuse the delay, or rather justify the necessity for proceeding in admiralty.

Appellant has assumed the burden of proving no inexcusable delay, and without a trial on the merits, as many cases hold, will not have the right or opportunity to do so.

Dated, Ketchikan, Alaska,
August 3, 1959.

Respectfully submitted,
ZIEGLER, ZIEGLER & CLOUDY,
By A. H. ZIEGLER,
Proctors for Appellant.

No. 16293✓

**United States
Court of Appeals**
for the Ninth Circuit

NATIONAL BONDED CARS, INC.,

Appellant,

vs.

FRANCIS B. RYAN, et al.,

Appellees.

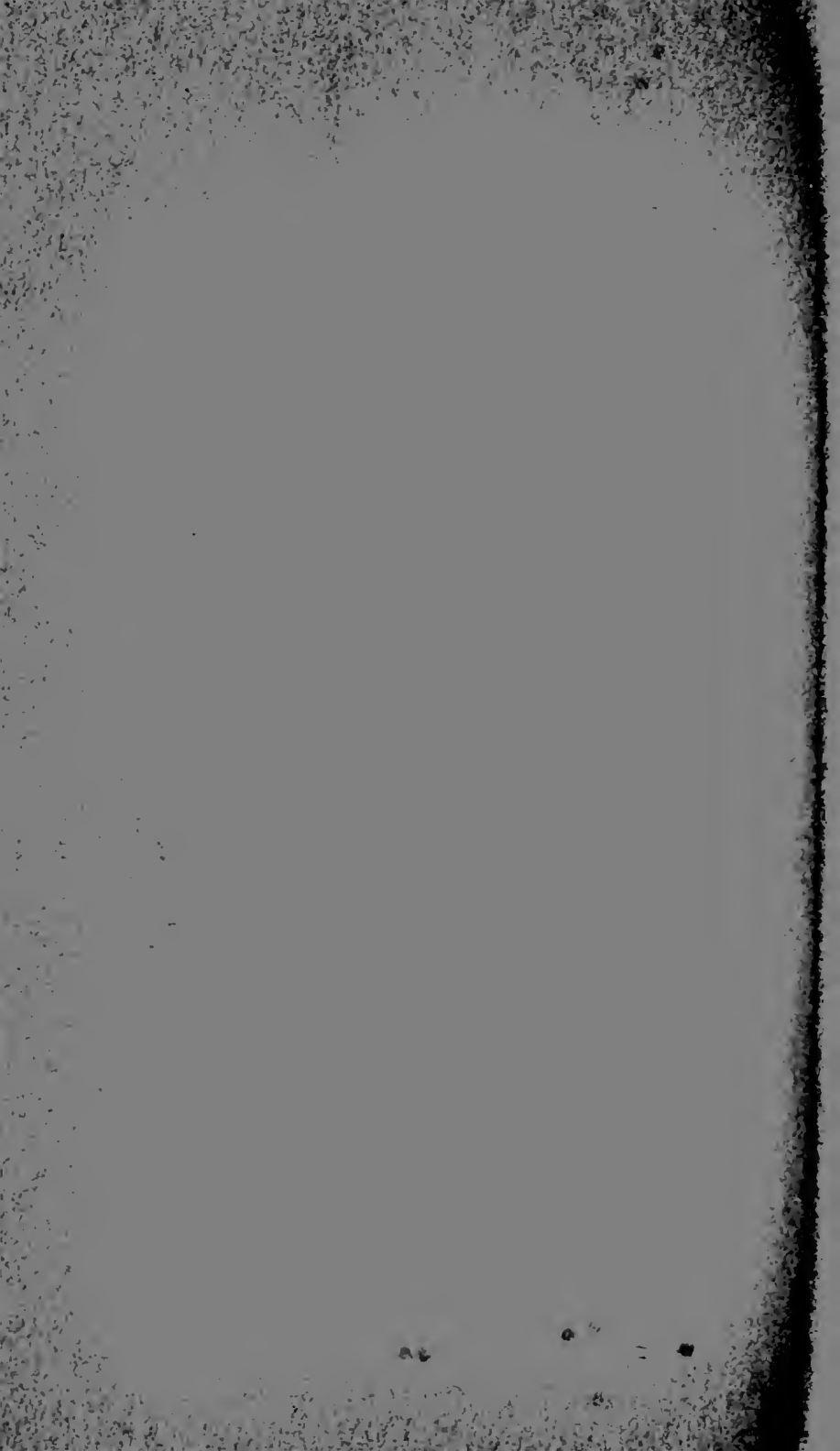
Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

FILED

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PAUL P. O'BRIEN, CLERK



No. 16293

**United States
Court of Appeals**
for the Ninth Circuit

NATIONAL BONDED CARS, INC.,

Appellant,

vs.

FRANCIS B. RYAN, et al.,

Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the Northern
District of California, Southern Division

Civil Action No. 37635

NATIONAL BONDED CARS, INC.,

Plaintiff,

vs.

FRANCIS B. RYAN, DONALD BROOKS, A. E.
HACKING, JAMES CHAMBERS, TRU-
MAN RENZ, JACK L. ROBERTSON, DON-
OLD B. LYNCH, NATIONAL BONDED
CARS OF SOUTHERN CALIFORNIA,
INC., BALBOA INSURANCE COMPANY,
THE CENTRAL AGENCY OF SAN FRAN-
CISCO, INCORPORATED; NATION-WIDE
AUTOMOBILE DEALERS INSURANCE
AGENCY and NATION-WIDE AUTOMO-
BILE MECHANICAL INSURANCE AGEN-
CY., INC.,

Defendants.

COMPLAINT

Count I.

1. The ground upon which the jurisdiction of the court depends is diversity of citizenship between the plaintiff and the defendants, and the amount in controversy herein exceeds \$10,000.00, exclusive of interest and costs. Plaintiff is a corporation, created and existing under the laws of the State of New Jersey, having its principal place of business at

120 Morris Avenue, Springfield, New Jersey. Upon information and belief, all of the individual defendants herein are citizens of the State of California and all of the other defendants herein are corporations created and existing under the laws of, and have their principal places of business in, the State of California.

2. Plaintiff is now, and for some years past has been, engaged in the business of inspecting all major mechanical parts of used or new automobiles and issuing warranties in connection therewith to purchasers of new and used automobiles throughout the United States, indemnifying said purchasers against the cost of repair or replacement of the automobile parts covered by said warranties.

3. On or about December 12, 1955, plaintiff entered into an agreement in writing with defendant Francis B. Ryan (hereinafter referred to as "Ryan"), a copy of which is hereto annexed, marked Exhibit A and made a part of this complaint.

4. On or about February 7, 1957, said agreement was superseded by another agreement in writing between plaintiff and Ryan, a copy of which is hereto annexed, marked Exhibit B and made a part of this complaint. By virtue of said agreements Ryan became, and at all times since December 12, 1955, acted and continues to act as, plaintiff's area representative in the northerly portion

of the State of California and the northerly portion of the State of Nevada.

5. Plaintiff has performed all of the conditions of said agreements to be performed by it, and all the conditions precedent of said agreements have occurred.

6. Ryan failed and neglected to perform said agreements in that during the period in which he acted as plaintiff's representative he wilfully mis-managed plaintiff's business in the aforesaid territory, allowed the cost of approved repairs under plaintiff's warranties on automobiles approved by inspectors supervised by him to remain excessive after warning by plaintiff, failed to devote his full time and attention and best efforts exclusively to the conduct of plaintiff's business in said territory, and engaged in another business which was and is competitive to the business conducted by plaintiff in said territory and diverted the accounts and customers of plaintiff to said other business.

Count II.

7. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1, 2, 3, 4 and 5 of this complaint with the same effect as if repeated at length in this paragraph.

8. In the course of its business plaintiff has conceived and developed certain unique ideas, forms, plans, systems and knowledge of doing business, including the general procedure, extent of inspec-

tion method and control of the issuance of warranties, repair procedure and the manner of verifying and paying all costs of repairs covered by the warranties issued by plaintiff. (Hereinafter said ideas, form, plans, systems and knowledge of doing business are collectively referred to as "plaintiff's trade secrets.")

9. Plaintiff's trade secrets were conceived and developed by plaintiff as the result of the expenditure of considerable time, effort and money and were known only to plaintiff and its officers, directors and employees.

10. In connection with the appointment of Ryan as plaintiff's area representative, plaintiff divulged to Ryan plaintiff's trade secrets with the understanding that they were to be used by Ryan only in connection with and for the furtherance of plaintiff's business.

11. In order to assist him in the conduct of plaintiff's business, Ryan, some time in 1957, employed defendants, Truman Renz (hereinafter referred to as "Renz") and Donald Brooks (hereinafter referred to as "Brooks") as salesmen and in the course of their employment Renz and Brooks also came to know plaintiff's trade secrets.

12. Notwithstanding the confidential nature of plaintiff's trade secrets, Ryan, Renz and Brooks wilfully and maliciously, with intent to injure plaintiff's business, have disclosed and continue to disclose plaintiff's trade secrets to many parties out-

side of plaintiff's organization, including all of the other defendants herein.

Count III.

13. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 and 2 of this complaint with the same effect as if repeated at length in this paragraph.

14. On or about December 12, 1955, plaintiff entered into an agreement in writing with Eugene B. O'Brien and Defendant A. E. Hacking (hereinafter referred to as "Hacking"), a copy of which is hereto annexed, marked Exhibit C and made a part of this complaint.

15. On or about October 8, 1956, said agreement was superseded by another agreement in writing between plaintiff and Hacking, a copy of which is hereto annexed, marked Exhibit D and made a part of this complaint.

16. By virtue of said agreements, Hacking became and at all times until on or about November 21, 1957, acted as plaintiff's area representative in the southerly portion of the State of California.

17. On or about November 21, 1957, Hacking's franchise from plaintiff for the southerly portion of the State of California was assigned to defendant, National Bonded Cars of Southern California, Inc. (hereinafter referred to as "National Bonded Cars of Southern California"), a corporation con-

trolled by Hacking and Defendant James Chambers (hereinafter referred to as "Chambers"), who are, respectively, the president and vice-president thereof.

18. By virtue of said assignment National Bonded Cars of Southern California became, and at all times since November 21, 1957, acted and continues to act as, plaintiff's area representative in the southerly part of the State of California.

19. Plaintiff has performed all the conditions of the aforesaid agreements with Hacking to be performed by it, and all the conditions precedent of the said agreements have occurred.

20. Hacking and National Bonded Cars of Southern California, Inc., have failed and neglected to perform said agreements in that during the respective periods in which they acted as plaintiff's representative they wilfully mismanaged plaintiff's business in the aforesaid territory, allowed the cost of approved repairs under plaintiff's warranties on automobiles approved by inspectors supervised by them to remain excessive after warning by plaintiff, failed to devote their full time and attention and best efforts exclusively to the conduct of plaintiff's business in said territory, and engaged in another business which was and is competitive to the business conducted by plaintiff in said territory and diverted the accounts and customers of plaintiff to said other business.

Count IV.

21. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 2, 8, 9, 14, 15, 16, 17, 18 and 19 of this complaint with the same effect as if repeated at length in this paragraph.

22. In connection with the appointment of Hacking as plaintiff's area representative, plaintiff divulged to Hacking plaintiff's trade secrets with the understanding that they were to be used by Hacking only in connection with and for the furtherance of plaintiff's business.

23. In order to assist him in the conduct of plaintiff's business, Hacking, some time in 1957, employed Chambers as his assistant and in the course of his employment Chambers also came to know plaintiff's trade secrets.

24. Notwithstanding the confidential nature of plaintiff's trade secrets, Hacking and Chambers wilfully and maliciously, with intent to injure plaintiff's business, have disclosed and continue to disclose plaintiff's trade secrets to many parties outside of plaintiff's organization, including all of the other defendants herein.

Count V.

25. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 24, inclusive, of this complaint with the same effect as if repeated at length in this paragraph.

26. Upon information and belief, at all times herein mentioned or referred to Defendants Jack L. Robertson (hereinafter referred to as "Robertson"), Donald B. Lynch (hereinafter referred to as "Lynch"), Balboa Insurance Co. (hereinafter referred to as "Balboa"), The Central Agency of San Francisco, Incorporated (hereinafter referred to as "Central"), Nation-Wide Automobile Dealers Insurance Agency (hereinafter referred to as "NADIA"), and Nation-Wide Automobile Mechanical Insurance Agency, Inc. (hereinafter referred to as "NAMIA"), had full knowledge of the aforesaid agreements between plaintiff and Ryan and between plaintiff and Hacking and of the trust and confidence and trade secrets reposed by plaintiff in Ryan and Hacking and, through them, in Renz, Brooks and Chambers.

27. During the period in which Ryan, Hacking and National Bonded Cars of Southern California, Inc., have acted as plaintiff's area representatives, upon information and belief, all of the defendants herein conspired to destroy the business of plaintiff and to divert its accounts and customers to competing business organizations in which said defendants had and now have an interest.

28. Upon information and belief, in furtherance of said conspiracy, (a) Ryan, Hacking, National Bonded Cars of Southern California, Inc., Renz, Brooks and Chambers, while associated with plaintiff, wilfully and unknown to plaintiff, diverted

existing and prospective customers and accounts from plaintiff to NADIA and NAMIA, caused plaintiff's warranty certificates to issue on defective automobiles for the purpose of causing plaintiff to suffer excessive losses by way of claims; (b) Hacking, Chambers and National Bonded Cars of Southern California, Inc., intentionally failed or unreasonably delayed to forward claims to plaintiff's home office for processing with the intent to injure plaintiff's reputation and impair its relations with its customers and accounts, presented fictitious claims to plaintiff and demanded kickbacks from certain repair shops for repair work given to them by said defendants in connection with plaintiff's business; (c) Lynch, Robertson, Balboa and Central induced Ryan, Hacking and National Bonded Cars of Southern California, Inc., to breach Ryan's and Hacking's agreements with plaintiff in the manner outlined in paragraphs 6 and 20 hereof; (d) Lynch, Robertson, Balboa, Central, NADIA and NAMIA induced Ryan, Hacking, Renz, Brooks and Chambers to disclose to them plaintiff's trade secrets and thereafter used said trade secrets for their own benefit and to the detriment of plaintiff; (e) Ryan, Renz and Brooks, with the help and advice of Robertson, Balboa and Central, some time in 1958, created NADIA for the purpose of engaging in the same business as plaintiff in Northern California, and fraudulently concealed Ryan's interest therein; (f) Hacking and Chambers, with the help and advice of Robertson, Balboa and Central,

some time in 1958, created NAMIA for the purpose of engaging in the same business as plaintiff in Southern California, and fraudulently concealed Hacking's interest therein; (g) Central, acting on behalf of Balboa, entered into agreements with NADIA and NAMIA whereby Balboa agreed to insure the mechanical automobile warranties sold by NADIA and NAMIA; (h) NADIA and NAMIA have been and are now engaging in the same business as plaintiff and in connection therewith they have been and are now unfairly competing with plaintiff in that they have been and are now using plaintiff's trade secrets and intentionally and fraudulently misleading customers and accounts of plaintiff into the belief that the business of NADIA and NAMIA is in fact a new insurance program of plaintiff and, by such means, inducing said customers and accounts to switch their business from plaintiff to NADIA and NAMIA; and (i) all of the defendants herein have attempted to induce, and in some cases, have induced, plaintiff's representatives in other areas of the United States to breach their agreements with plaintiff, create competing business organizations and divert plaintiff's customers and accounts thereto.

29. As a result of the foregoing activities by and on the part of defendants, plaintiff has suffered and will, unless defendants are enjoined by this court, continue to suffer, irreparable damage.

Wherefore, plaintiff demands judgment:

A. That Ryan, Hacking, Renz, Brooks, Chambers, National Bonded Cars of Southern California, Inc., NADIA, NAMIA and each of the officers, directors and employees of National Bonded Cars of Southern California, Inc., NADIA and NAMIA be enjoined during the pendency of this action and permanently thereafter from engaging in the business of selling mechanical automobile warranties or in any similar business competitive with plaintiff's business.

B. That Balboa and Central, and each of their officers, directors and employees, be enjoined during the pendency of this action and permanently thereafter from insuring mechanical automobile warranties or any similar guarantees issued by or through NADIA or NAMIA.

C. That the agreement between plaintiff and Ryan, a copy of which is annexed hereto as Exhibit "A," be terminated and that Ryan be enjoined during the pendency of this action and permanently thereafter from acting or purporting to act as plaintiff's area representative in the territory referred to in said agreement.

D. That the agreement between plaintiff and Hacking, a copy of which is annexed hereto as Exhibit "D," be terminated and that Hacking and National Bonded Cars of Southern California, Inc., be enjoined during the pendency of this action and permanently thereafter from acting or purporting

to act as plaintiff's area representatives in the territory referred to in said agreement.

E. That NADIA and NAMIA be required to assign to and vest in plaintiff all of their and/or each of their interests in and to any agreements or franchises with their customers and accounts.

F. That NADIA and NAMIA be required to account to plaintiff for all gains and profits made by each of them in the course of their business from the inception thereof, and to pay over such gains and profits, if any, to plaintiff.

G. That Ryan, Hacking, Renz, Brooks and Chambers be required to account to plaintiff for all salaries, compensation, and other income received by them from or in connection with the operation of a mechanical automobile warranty business or any similar business competitive with plaintiff's business, other than plaintiff's business, and to pay over such salaries, compensation and other income, if any, to plaintiff.

H. For damages against Ryan with respect to Count I of this complaint in the sum of \$500,000.00.

I. For damages against Ryan, Renz and Brooks with respect to Count II of this complaint in the sum of \$500,000.00 and for exemplary damages against said defendants with respect to said Count in the sum of \$500,000.00.

J. For damages against Hacking and National Bonded Cars of Southern California, Inc., with re-

spect to Count III of this complaint in the sum of \$350,000.00.

K. For damages against Hacking and Chambers with respect to Count IV of this complaint in the sum of \$350,000.00 and for exemplary damages against said defendants with respect to said Count in the sum of \$350,000.00.

L. For damages against all of the defendants herein with respect to Count V of this complaint in the sum of \$500,000.00 and for exemplary damages against said defendants with respect to said Count in the sum of \$500,000.00.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

Duly verified.

EXHIBIT "A"

License and Franchise Agreement

Agreement made in Union, New Jersey, the 12th day of December, 1955, by and between National Bonded Cars, Inc., a New Jersey Corporation having its principal office and place of business at 1965 Morris Avenue in the Township of Union, County

of Union and State of New Jersey (hereinafter called "Licensor"), and Francis B. Ryan (hereinafter called "Licensee").

Witnesseth:

Whereas, Licensor is the owner of certain ideas, forms, plans, system and knowledge for engaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of an independent Warranty thereof. The performance of such Warranty is insured under a master policy with The Employers' Liability Assurance Corporation, Limited, of 110 Milk Street, Boston, Massachusetts, and will continue to maintain such policy or some substantially similar policy with a recognized Insurance Company for so long as it is necessary in its business, and has developed and practically applied such forms and system of doing business to its inspections, general procedure, repair procedure and the manner of indemnifying and paying all claims, losses or the adjustment and settlement thereof under said Warranty in actual business operation, and

Whereas, the Licensee is desirous of securing a license and franchise to conduct the aforesaid business of the Licensor in the following territory, viz.: Counties attached hereto and made a part of this License and Franchise:

Northerly portion of the State of California, extending southward to, but not including the Coun-

ties of San Luis Obispo, Kern and Inyo, and the northerly part of the State of Nevada, including all counties except the following: Esmeralda, Nye, Lincoln and Clark.

and

Whereas, the Licensor is desirous of aiding the Licensee therein and in providing itself and other Licensees with full protection of its said ideas, forms, plans, system and knowledge of doing business, including the general procedure, method and extent of inspection, method and control of the issuance of Warranties, repair procedure, and the manner of verifying, indemnifying and paying of all claims, losses and insurance as developed, adopted, and carried out by it in the conduct of its said business now and as hereinafter may be modified by it from time to time,

Now, Therefore, it is mutually agreed as follows:

1. Licensor hereby grants an exclusive license to Licensee to adopt and use its aforesaid ideas, forms, plans, system and knowledge for the making of such automobile inspections and the issuance of such Warranties to the purchasers of approved new or used cars within the territory described herein.

2. All business done by the Licensee shall be conducted in its own name as Licensee hereunder, except that it shall have the right to use the name of the Licensor on the door of its office, its stationery and forms, but only to such extent and in such

manner as may be approved from time to time by the Licensor in writing, it being the intent of the Licensor that they be only in such form and manner as will in no way subject the Licensor to any Liability of any kind, nature or description to any third parties with whom Licensee may do business except under the terms of duly signed dealer's contracts with the Licensor and duly issued warranties of the Licensor to the respective holders thereof. All contracts with dealers must be confirmed by the Licensor at its home office in writing before becoming effective.

3. Licensor agrees to make available to Licensee any new ideas, plans, forms, systems, advertising copy and improvements in the method of the conduction of its business that may be developed during the existence of the License and Franchise Agreement and to cause its duly qualified officers and employees at the expense of the Licensee, to consult with the Licensee and advise it from time to time on all matters in regard thereto. Cost therefore to the Licensee shall be limited to out-of-pocket expenses of such officer or employee necessarily expended in connection with such consultation and advice.

4. Licensor agrees to pay to the Licensee Eight Dollars (\$8.00) for each car for which Licensee remits to it a fee for the inspection and issuance of a Warranty thereon; Four Dollars (\$4.00) for each rejected car for which Licensee remits an inspection Fee; Four Dollars (\$4.00) for each rejected car

that is reinspected, approved, and a Warranty issued thereon for which Licensee remits the fee, and Eight Dollars (\$8.00) for each car for which Licensee remits to Licensor an Emergency Warranty fee on new or used cars and its inspection report and approval.

Licensor agrees that after Licensee has inspected and remitted fees for five thousand inspections to pay to the Licensee Nine Dollars, (\$9.00) for each car for which Licensee remits to it a fee for the inspection and issuance of a Warranty thereon; Four Dollars and Fifty Cents (\$4.50) for each rejected car for which Licensee remits an inspection fee; Four Dollars and Fifty Cents (\$4.50) for each rejected car that is reinspected, approved, and a Warranty issued thereon for which Licensee remits the fee, and Nine Dollars (\$9.00) for each car for which Licensee remits to Licensor an Emergency Warranty fee on new or used cars and its inspection report and approval.

5. Licensee agrees as follows:

a. To merchandise the inspection and warranty of National Bonded Cars, Inc., at a price per vehicle prescribed by it.

b. To remit to the Licensor immediately on collection, at its home office, the total amount of all monies collected by it for each inspection made hereunder, both when the inspected automobile is rejected for warranty, and when the inspected vehicle is approved and a warranty duly issued.

c. To use only the form of Dealer's Agreement prescribed and authorized by National Bonded Cars, Inc., and to limit its use strictly to new car dealers.

d. To require that all checks for payments made upon inspection, at the time the issuance of a Warranty by a dealer to the purchaser of a car thereby covered and at the time of the issuance of emergency Warranties be made out to National Bonded Cars, Inc., and remitted to it forthwith by the Licensee.

e. To keep true and correct books and accounts in accordance with the bookkeeping system recommended by the Licensor. The Licensee shall pay the entire cost of establishing, maintaining, and auditing the books and records as required hereunder. These books and records shall be available for inspection by the Licensor or its duly authorized representative during all regular business hours.

f. To provide an appropriate office for the conducting of such business in said territory.

g. To employ such salesmen, inspectors, office help, and other employees as may be necessary to carry out its aforesaid business within said territory and to maintain in form satisfactory to the Licensor adequate unemployment and liability insurance covering such employees and any automobiles that may operate in connection with their business activities, in form and amount satisfactory to the Licensor and with the insurance of appro-

prate Certificates of Insurance to the Licensor for its proper protection in connection therewith.

h. To maintain a separate local bank account in the name of the Licensee for the sole purpose of the conduct of its business as Licensee and Franchise holder which shall be opened at the time Licensee commences business. A statement of this account shall be made available to the Licensor whenever demanded by it in writing, and all statements of this account covering the entire period of its existence shall likewise be available to the Licensor at any time upon demand.

i. To devote his full time and attention and best efforts exclusively to the conduct of said business under this License and Franchise Agreement and to use his best efforts to procure conscientious inspectors, salesmen and other employees, the names, addresses and qualifications of which shall be sent to Licensor immediately upon their hiring, and further agrees that he will discharge any and all employees designated by the Licensor as failing to come up to the standard required by the Licensor.

j. That he shall be solely responsible for all costs and expenses in connection with the establishment and maintenance of the said business and for taxes and levies of any and all kinds in connection therewith, and the income to the Licensee arising therefrom, and that Licensor shall not be liable for any such expenses, taxes, levies, or disbursements paid or incurred in connection with the establishment

and maintenance of said business, and Licensee agrees to indemnify and hold Licensor harmless from any and all claims, law suits, demands and other causes of action that may arise or be asserted against Licensor by reason of the establishment and maintenance of the aforesaid business by the Licensee, or by reason of Licensee's use of the name of Licensor and to reimburse it for all counsel fees and expenses in defending the same, and it is understood and agreed that in granting this license, Licensor does not authorize or empower Licensee to use its name in any other capacity than as provided hereunder, nor to enter into any contracts, leases, or execute any other documents or instruments in writing in its name, or in any way as agent for it or to hold himself out as a general or special agent, or partner of Licensor in any way except as hereinbefore specifically set forth and provided.

k. The Licensee, or its partners, or its executive officers or principal stockholders will not have any interest, financial or otherwise in any business which is in any way competitive with that of the Licensor throughout the term of the existence of this Franchise and License Agreement and for the period of three (3) years after any termination thereof, nor shall he or any of them take employment of any kind in any such competing business during the said period of three (3) years beyond the expiration of this License and Franchise Agreement.

l. Licensee shall conduct its business in the gen-

eral manner provided therefore under this License and Franchise Agreement and shall make no material deviation therefrom without the prior written consent of the Licensor. Any question arising in connection therewith shall rest in the sole and absolute discretion of the Licensor and any violation thereof shall at its option constitute a breach of this agreement.

m. All advertising to be placed by Licensee in newspapers, periodicals or signs for production by radio and television, and all forms and other printed matter used in connection with the conduct of such business shall be subject to the written approval of Licensor as to content, form, quality of the printing and the paper proposed to be used before being used.

6. The term of the License granted hereunder is for one year commencing on the date of the execution hereunder unless such term shall be sooner terminated in accordance with the provisions hereof, and shall be renewed automatically thereafter from year to year unless the Licensee herein shall give written notice to the Licensor of his desire to terminate this agreement not later than sixty (60) days prior to the end of the then current term.

7. The Licensee agrees to comply in all respects with all laws, statutes, rules and regulations, Federal, State, County and Municipal, and of all other governmental authorities that may be necessary for or incident to the conduct of its business as such

Licensee and Franchise holder under the terms of this agreement at its own cost and expense, and upon demand, to furnish appropriate evidence of such compliance to the Licensor; and the Licensee hereby agrees to indemnify the Licensor and to hold it harmless against any possible claims against it, and to reimburse any expenses it may have including legal fees for any failure of the Licensee to fully comply therewith.

8. Licensee recognizes that the branch office to be opened by Licensee hereunder will be a component of many such branch offices operated by various Licensees throughout the country, and to insure substantial uniformity throughout such branch offices, Licensee agrees to conform to any and all instructions of Licensor regarding basic policies pertaining to the conduct of such business by Licensee hereunder, which policy shall include but not be limited to advertising, management, sales policies, methods of inspection and operating procedures and techniques.

9. If Licensee shall fail to perform, keep and observe any covenant, term or condition of this agreement, or fails for a reasonable period of time to maintain the volume of business that is done by other Licensees in comparable areas, a default hereunder shall be deemed to exist. This License and Franchise is granted subject to the specific condition that if a default hereunder on the part of Licensee is not cured within thirty days after written notice of default delivered by Licensor to

Licensee, the License and Franchise herein granted may be forthwith terminated by Licensor but without prejudice to any other rights or remedies Licensor may have.

10. No car over five years old (five model years) shall be inspected for Warranty. Licensor shall have the right at any and all times to reinspect any cars inspected hereunder to see that its inspection standards and requirements are being maintained. Three such reinspection visits per year shall be paid for by Licensee, at cost, which cost shall be actual salary plus expenses, not to exceed \$200 per visit. Should the Warranty loss ratio on cars approved by Licensee exceed Sixty per cent (60%), Licensor may cancel this franchise forthwith.

11. In the event that Licensee shall file a voluntary or involuntary petition in bankruptcy, or a petition for relief under any Federal or State bankruptcy or insolvency laws, this agreement shall forthwith terminate upon the date of the filing thereof.

In the event that a petition for relief under any Federal or State Bankruptcy or insolvency laws shall be filed against Licensee and any and all such proceedings are not completed and discharged within thirty (30) days, or in the event of the involuntary dissolution of Licensee, this agreement shall forthwith terminate.

12. Licensee shall not sell, transfer, assign, sublicense, mortgage or pledge this agreement or any

rights or privileges accruing hereunder, to any person, firm or corporation without the written consent of Licensor first had and obtained and in the event the Licensee shall be a Corporation there shall be no sale or transfer of stock to others without the written consent of the Licensor.

13. Licensee agrees to maintain adequate Workmen's Compensation and Employers' Liability Insurance, and to make any and all requisite withholding, social security payments and/or taxes in accordance with the laws of the United States and the territories named herein.

14. This agreement shall not be deemed to create any relationship of agency, partnership or joint venture between the parties hereto. No employee engaged by Licensee shall, under any circumstances, be deemed to be an employee of Licensor, and all employees engaged by Licensee shall be so notified.

15. Any notice required to be given pursuant hereto shall be mailed to:

Licensor: National Bonded Cars, Inc., 1965
Morris Avenue, Union, New Jersey.

Licensee: Address given as soon as office is established.

16. The failure of the Licensor to insist, in any one or more instances, upon strict performance of any one or more of the items and conditions of this agreement, or to exercise any rights hereunder, shall

not be construed as a waiver thereof, but the same shall continue and remain in full force and effect.

17. This agreement contains the entire agreement between Licensor and Licensee, and any agreements hereafter made shall be ineffective to change, modify or discharge it in whole or in part unless such agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.

18. This agreement shall be construed interpreted in accordance with the provisions of the laws of the State of New Jersey.

In Witness Whereof, the undersigned have executed this agreement the day and year first above written.

NATIONAL BONDED CARS,
INC.,

By /s/ HARRY S. CAMPBELL,
President;

By /s/ WESLEY MILBURN,
Treasurer;

By /s/ FRANCIS B. RYAN,
Licensee.

In the Presence of:

/s/ P. B. THOMPSON,

/s/ FRED W. FLAHERTY.

EXHIBIT "B"

Area Franchise Agreement

Agreement made in Springfield, New Jersey, the 7th day of February, 1957, by and between National Bonded Cars, Inc., a New Jersey Corporation having its principal office and place of business at 120 Morris Avenue in the Township of Springfield, County of Union and State of New Jersey (hereinafter called "Company"), and Francis B. Ryan (hereinafter called "Area Representative").

Witnesseth:

Whereas, the Company is the owner of certain ideas, forms, plans, system and knowledge for engaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of a warranty in connection therewith, and has developed and practically applied such forms and system of doing business, as qualified automotive experts, to its inspections, general procedure, repair procedure and the manner of verifying and paying the costs of repairs covered by said warranty in actual business operation, and

Whereas, the Area Representative is desirous of securing an area representative agreement to conduct the aforesaid business of the Company in the following territory viz.: Counties attached to and made a part of this area franchise agreement:

Northerly portion of the State of California, extending southward to, but not including the Coun-

ties of San Luis Obispo, Kern and Inyo, and the northerly part of the State of Nevada, including all counties except the following: Esmeralda, Nye, Lincoln and Clark.

and

Whereas, the Company is desirous of aiding the Area Representative therein, and in providing itself and other Area Representatives with its said ideas, forms, plans, system and knowledge of doing business, including the general procedure, method and extent of inspection method and control of the issuance of warranties, repair procedure, and the manner of verifying and paying of all costs of repairs covered by our warranty, as developed, adopted, and carried out by it in the conduct of its said business, now and as hereinafter may be modified by it from time to time.

Now, Therefore, it is mutually agreed as follows:

1. Company hereby grants an exclusive area representative agreement to Area Representative to use on behalf of the Company its aforesaid ideas, forms, plans, system and knowledge for the making of such automobile inspections and the issuance of the certification and warranty incidental thereto on approved new or used cars within the territory described herein.

2. All business done by the Area Representative shall be conducted for its own account as Area Representative hereunder, except as set forth in.

paragraph 1, above, and it shall use the name of the Company on the door of its office, its stationery and forms, but only to such extent and in such manner as may be approved from time to time by the Company in writing, it being the intent of the Company that they be only in such form and manner as will in no way subject the Company to any liability of any kind, nature or description to any third parties with whom Area Representative may do business except as herein specifically authorized and under the terms of duly signed dealer's contracts with the Company, inspections made thereunder and duly issued warranties of the Company to the respective holders thereof. All contracts with dealers must be confirmed by the Company at its home office in writing before becoming effective.

3. Area Representative agrees to accept any and all new ideas, plans, forms, systems, advertising copy, and improvements or changes in the method of the conduction of such business as may be developed hereunder and to change or modify its operation in accordance with any and all instructions immediately upon receipt thereof from the Company.

4. It is clearly understood that Area Representative is to pay all expenses in connection with the operation of its office in the territory, and all expenses in connection with the obligations assumed by Area Representative under this agreement out of the pay received by it from the Company as follows:

The Company agrees to pay to the Area Representative Nine (\$9.00) Dollars for each approved vehicle, for which the Company has received its prescribed fee and an inspection report and approval; (\$4.50) for each rejected car for which the Company has received its prescribed fee and inspection report and rejection; and (\$4.50) for each rejected car that is reinspected and approved for which the Company has received its prescribed fee and reinspection report and approval.

5. Area Representative agrees as follows:

a. To merchandise the inspection service and warranty of National Bonded Cars, Inc., at a price per vehicle prescribed by it.

b. To remit to the Company immediately on collection, at its home office, the total amount of all monies collected by it for each inspection made hereunder, both when the inspected automobile is rejected for warranty, and when the inspected vehicle is approved and a warranty duly issued.

c. To use only the form of Dealer's Agreement prescribed and authorized by National Bonded Cars, Inc., and to limit its use strictly to new car dealers.

d. To require that all checks for payments made upon inspection, and at the time of issuance of a warranty by a dealer to the purchaser of a car be made out to National Bonded Cars, Inc., and remitted to it forthwith by the Area Representative.

e. To keep true and correct books and accounts in accordance with the bookkeeping system recom-

mended by the Company. The Area Representative shall pay the entire cost of establishing, maintaining, and auditing the books and records as required hereunder. These books and records shall be available for inspection by the Company or its duly authorized representative during all regular business hours.

f. To provide an appropriate office for the conducting of such business in said territory.

g. To employ such salesmen, inspectors, office help, and other employees as may be necessary to carry out its aforesaid business within said territory and to maintain in form satisfactory to the Company adequate unemployment and liability insurance covering such employees and any automobiles that may operate in connection with their business activities, in form and amount satisfactory to the Company and with the issuance of appropriate Certificates of Insurance to the Company for its proper protection in connection therewith. Particular care shall be used in the selection and hiring of inspectors, the employment of whom must be previously approved in writing by the Company and whose continued employment as such inspectors must at all times remain completely satisfactory to the Company.

h. To maintain a separate local bank account in the name of the Area Representative for the sole purpose of the conduct of its business as Area Representative which shall be opened at the time Area Representative commences business. A statement of this account shall be made available to the Company whenever demanded by it in writing, and

all statements of this account covering the entire period of its existence shall likewise be available to the Company at any time upon demand.

i. To devote its full time and attention and best efforts exclusively to the conduct of said business under this area representative agreement and to use its best efforts to procure conscientious inspectors, salesmen and other employees, the names, addresses and qualifications of which shall be sent to Company immediately upon their hiring, and further agrees that he will discharge any and all employees designated by the Company as failing to come up to the standard required by the Company. Particular care will be used in the supervision of the activities of all inspectors, who will act as agents of the Company in making inspections; in checking automobiles when repairs have been requested; and in issuing drafts on the Company in payment of repair bills for approved repairs. No inspectors will be hired until approved by the Company and fully trained by it for the exercise of their duties, and in such exercise will adhere rigidly to the requirements of the inspection manual and any other instructions, directions, or requirements of the Company concerning method and extent of their activities.

j. That as Area Representative it shall be solely responsible for all costs and expenses in connection with the establishment and maintenance of the said business, and for taxes and levies of any and all kinds in connection therewith, and the income of the Area Representative arising therefrom, and that

Company shall not be liable for any such expenses, taxes, levies or disbursements paid or incurred in connection with the establishment and maintenance of said business, and Area Representative agrees to indemnify and hold Company harmless from any and all claims, lawsuits, demands and other causes of action that may arise or be asserted against Company by reason of the establishment and maintenance of the aforesaid business by the Area Representative or by reason of Area Representative's use of the name of Company and to reimburse it for all counsel fees and expenses in defending the same, and it is understood and agreed that in granting this Agreement, Company does not authorize or empower Area Representative to use its name in any other capacity than as provided hereunder, nor to enter into contracts, leases, or execute any other documents or instruments in writing in its name, or in any way as agent for it or to hold himself out as a general or special agent, or partner of Company, in any way except as herein specifically set forth and provided.

k. The Area Representative, or its partners, or its executive officers or principal stockholders will not have any interest, financial or otherwise in any business which is in any way competitive with that of the Company throughout the term of the existence of this Area Representative Agreement and for the period of three (3) years after any termination thereof, nor shall it or any one connected with it take employment of any kind in any such competing business during the same period of three (3) years

beyond the expiration of this Area Representative Agreement.

1. Area Representative shall conduct its business in the manner provided hereunder, and shall make no material deviation therefrom without the prior written consent of the Company. Any question arising in connection therewith shall rest in the sole and absolute discretion of the Company, and any violation thereof shall at its option constitute a breach of this agreement.

m. All advertising to be placed by Area Representative in newspapers, periodicals or signs and for production by radio and television, and all forms and other printed matter used in connection with the conduct of such business shall be subject to the written approval of Company as to content, form, quality of the printing and the paper proposed to be used before being used.

6. The term of this agreement is for one year commencing on the date of the execution hereof, unless such term shall be sooner terminated in accordance with the provisions hereof, and shall be renewed automatically thereafter from year to year so long as Area Representative performs to the satisfaction of the Company hereunder.

7. The Area Representative agrees to comply in all respects with all laws, rules and regulations, Federal, State, County and Municipal, and of all other governmental authorities that may be necessary for or incident to the conduct of its business as such Area Representative under the terms of this agree-

ment at its own cost and expense, and upon demand, to furnish appropriate evidence of such compliance to the Company; and the Area Representative hereby agrees to indemnify the Company and to hold it harmless against any possible claims against it, and to reimburse any expenses it may have including legal fees for any failure of the Area Representative to fully comply therewith.

8. Area Representative recognizes that the branch office to be opened by Area Representative hereunder will be a component of many such branch offices operated by various Area Representatives throughout the country, and to insure substantial uniformity throughout such branch offices, Area Representative agrees to conform to any and all instructions of Company regarding basic policies pertaining to the conduct of such business by Area Representative hereunder, which policy shall include but not be limited to advertising, management, sales policies, methods of inspection and operating procedures and techniques.

9. If Area Representative shall fail to perform, keep and observe any covenant, term or condition of this agreement, or fails for a reasonable period of time to maintain the volume of business that is done by other Area Representatives in comparable areas, a default hereunder shall be deemed to exist. This agreement is made subject to the specific condition that if a default hereunder on the part of Area Representative is not cured within thirty days after written notice of default delivered by Com-

pany to Area Representative, the agreement herein granted may be forthwith terminated by Company, but without prejudice to any other rights or remedies Company may have.

10. No car over five years old (five model years) shall be inspected for warranty. Area Representative will carefully supervise the work of all inspectors for the Company for and on its behalf to see that the requirements of the inspection manual, and training and direction of the Company covering such inspections be fully and carefully carried out by them in the making of all inspections for the Company. Company shall have the right at any and all times to re-inspect any cars inspected hereunder to see that its inspection standards and requirements are being maintained. Regular periodic reinspections will be made by the chief inspectors from our home office at the Company's expense. Should the cost of approved repairs under the warranty on cars approved by inspectors supervised by Area Representative remain excessive after warning, in the sole and absolute discretion of the Company, the Company may cancel this agreement forthwith.

11. In the event that Area Representative shall file a voluntary or involuntary petition in bankruptcy, or a petition for relief under any Federal or State bankruptcy or insolvency laws, this agreement shall forthwith terminate upon the date of the filing thereof.

In the event that a petition for relief under any Federal or State Bankruptcy or insolvency laws

shall be filed against Area Representative and any and all such proceedings are not completed and discharged within thirty (30) days, or in the event of the involuntary dissolution of Area Representative, this agreement shall forthwith terminate.

12. Area Representative shall not sell, transfer, assign, mortgage or pledge this agreement or any rights or privileges accruing hereunder, to any person, firm or corporation without the written consent of Company first had and obtained and in the event the Area Representative shall be a Corporation there shall be no sale or transfer of stock to others without the written consent of the Company.

13. Area Representative agrees to provide and pay for adequate Workmen's Compensation and Employers' Liability Insurance, and to make any and all requisite withholding, social security payments and/or taxes in accordance with the laws of the United States and the territories named herein.

14. Area Representative agrees to pay for the training of its inspectors either in the field or at the home office. Such payment shall be limited to out of pocket and travel expenses, plus \$25.00 per day in the field, chargeable against payments to be made to Area Representative hereunder.

15. Time is of the essence of this Area Representative Agreement and the Area Representative agrees to have an office organized and in operation within thirty (30) days from the date of this agreement.

16. Any notice required to be given pursuant thereto shall be mailed to

Company: National Bonded Cars, Inc., 120 Morris Avenue, Springfield, New Jersey.

Area Representative: Francis B. Ryan, 2446 Van Ness Ave., San Francisco, California.

17. The failure of the Company to insist, in any one or more instances, upon strict performance of any one or more of the terms and conditions of this agreement, or to exercise any rights hereunder, shall not be construed as a waiver thereof, but the same shall continue and remain in full force and effect.

18. This agreement contains the entire agreement between Company and Area Representative, and any agreements hereafter made shall be ineffective to change, modify or discharge it in whole or in part unless such agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.

19. This agreement shall be construed and interpreted in accordance with the provisions of the laws of the State of New Jersey.

In Witness Whereof, the undersigned have executed this Agreement the day and year first above written.

NATIONAL BONDED CARS,
INC.,

By /s/ HARRY S. CAMPBELL,
President;

By /s/ WESLEY MILBURN,
Treasurer;

By /s/ FRANCIS B. RYAN,
Area Representative.

In the Presence of:

/s/ FRED W. FLAHERTY.

EXHIBIT "C"

License and Franchise Agreement

Agreement made in Union, New Jersey, the 12th day of December, 1955, by and between National Bonded Cars, Inc., a New Jersey Corporation having its principal office and place of business at 1965 Morris Avenue in the Township of Union, County of Union and State of New Jersey (hereinafter called "Licensor"), and Eugene B. O'Brien and A. E. Hacking, Jr. (hereinafter called "Licensee").

Witnesseth:

Whereas, Licensor is the owner of certain ideas, forms, plans, system and knowledge for engaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of an independent Warranty thereof. The performance of such Warranty is insured under a master policy with The Employers' Liability Assurance Corporation, Limited of 110 Milk Street, Boston, Massachusetts, and will continue to maintain such policy or some substantially similar policy with a recognized Insur-

ance Company for so long as it is necessary in its business, and has developed and practically applied such forms and system of doing business to its inspections, general procedure, repair procedure and the manner of indemnifying and paying all claims, losses or the adjustment and settlement thereof under said Warranty in actual business operation, and

Whereas, the Licensee is desirous of securing a license and franchise to conduct the aforesaid business of the Licensor in the following territory viz.: Counties attached hereto and made a part of this License and Franchise:

Southerly portion of the State of California, which will extend northward to include the counties of San Luis Obispo, Kern and Inyo. In addition it shall include the following counties in the State of Nevada: Esmeralda, Nye, Lincoln and Clark.

and

Whereas, the Licensor is desirous of aiding the Licensee therein and in providing itself and other Licensees with full protection of its said ideas, forms, plans, system and knowledge of doing business, including the general procedure, method and extent of inspection, method and control of the issuance of Warranties, repair procedure, and the manner of verifying, indemnifying and paying of all claims, losses and insurance as developed, adopted, and carried out by it in the conduct of its said busi-

ness now and as hereinafter may be modified by it from time to time,

Now Therefore, it is mutually agreed as follows:

1. Licensor hereby grants an exclusive license to Licensee to adopt and use its aforesaid ideas, forms, plans, system and knowledge for the making of such automobile inspections and the issuance of such Warranties to the purchasers of approved new or used cars within the territory described herein.

2. All business done by the Licensee shall be conducted in its own name as Licensee hereunder, except that it shall have the right to use the name of the Licensor on the door of its office, its stationery and forms, but only to such extent and in such manner as may be approved from time to time by the Licensor in writing, it being the intent of the Licensor that they be only in such form and manner as will in no way subject the Licensor to any Liability of any kind, nature or description to any third parties with whom Licensee may do business except under the terms of duly signed dealer's contracts with the Licensor and duly issued warranties of the Licensor to the respective holders thereof. All contracts with dealers must be confirmed by the Licensor at its home office in writing before becoming effective.

3. Licensor agrees to make available to Licensee any new ideas, plans, forms, systems, advertising copy and improvements in the method of the conduction of its business that may be developed during

the existence of the License and Franchise Agreement and to cause its duly qualified officers and employees at the expense of the Licensee, to consult with the Licensee and advise it from time to time on all matters in regard thereto. Cost therefore to the Licensee shall be limited to out of pocket expenses of such officer or employee necessarily expended in connection with such consultation and advice.

4. Licenser agrees to pay to the Licensee Eight Dollars (\$8.00) for each car for which Licensee remits to it a fee for the inspection and issuance of a Warranty thereon; Four Dollars (\$4.00) for each rejected car for which Licensee remits an inspection fee; Four Dollars (\$4.00) for each rejected car that is reinspected, approved, and a Warranty issued thereon for which Licensee remits the fee, and Eight Dollars (\$8.00) for each car for which Licensee remits to Licenser an Emegency Warranty fee on new or used cars and its inspection report and approval.

Licenser agrees that after Licensee has inspected and remitted fees for five thousand inspections to pay to the Licensee Nine Dollars (\$9.00) for each car for which Licensee remits to it a fee for the inspection and issuance of a Warranty thereon; Four Dollars and fifty cents (\$4.50) for each rejected car for which Licensee remits an inspection fee; Four Dollars and fifty cents (\$4.50) for each rejected car that is reinspected, approved, and a Warranty issued thereon for which Licensee remits the

fee, and Nine Dollars (\$9.00) for each car for which Licensee remits to Licensors an Emergency Warranty fee on new or used cars and its inspection report and approval.

5. Licensee agrees as follows:

a. To merchandise the inspection and warranty of National Bonded Cars, Inc., at a price per vehicle prescribed by it.

b. To remit to the Licensors immediately on collection, at its home office, the total amount of all monies collected by it for each inspection made hereunder, both when the inspected automobile is rejected for warranty, and when the inspected vehicle is approved and a warranty duly issued.

c. To use only the form of Dealer's Agreement prescribed and authorized by National Bonded Cars, Inc., and to limit its use strictly to new car dealers.

d. To require that all checks for payments made upon inspection, at the time the issuance of a Warranty by a dealer to the purchaser of a car thereby covered and at the time of the issuance of emergency Warranties be made out to National Bonded Cars, Inc., and remitted to it forthwith by the Licensee.

e. To keep true and correct books and accounts in accordance with the bookkeeping system recommended by the Licensors. The Licensee shall pay the entire cost of establishing, maintaining, and auditing

the books and records as required hereunder. These books and records shall be available for inspection by the Licensor or its duly authorized representative during all regular business hours.

f. To provide an appropriate office for the conducting of such business in said territory.

g. To employ such salesmen, inspectors, office help, and other employees as may be necessary to carry out its aforesaid business within said territory and to maintain in form satisfactory to the Licensor adequate unemployment and liability insurance covering such employees and any automobiles that may operate in connection with their business activities, in form and amount satisfactory to the Licensor and with the insurance of appropriate Certificates of Insurance to the Licensor for its proper protection in connection therewith.

h. To maintain a separate local bank account in the name of the Licensee for the sole purpose of the conduct of its business as Licensee and Franchise holder which shall be opened at the time Licensee commences business. A statement of this account shall be made available to the Licensor whenever demanded by it in writing, and all statements of this account covering the entire period of its existence shall likewise be available to the Licensor at any time upon demand.

i. To devote his full time and attention and best efforts exclusively to the conduct of said business under this License and Franchise Agreement and to

use his best efforts to procure conscientious inspectors, salesmen and other employees, the names, addresses and qualifications of which shall be sent to Licensor immediately upon their hiring, and further agrees that he will discharge any and all employees designated by the Licensor as failing to come up to the standard required by the Licensor.

j. That he shall be solely responsible for all costs and expenses in connection with the establishment and maintenance of the said business and for taxes and levies of any and all kinds in connection therewith, and the income to the Licensee arising therefrom, and that Licensor shall not be liable for any such expenses, taxes, levies, or disbursements paid or incurred in connection with the establishment and maintenance of said business, and Licensee agrees to indemnify and hold Licensor harmless from any and all claims, lawsuits, demands and other causes of action that may arise or be asserted against Licensor by reason of the establishment and maintenance of the aforesaid business by the Licensee, or by reason of Licensee's use of the name of Licensor and to reimburse it for all counsel fees and expenses in defending the same, and it is understood and agreed that in granting this license, Licensor does not authorize or empower Licensee to use its name in any other capacity than as provided hereunder, nor to enter into any contracts, leases, or execute any other documents or instruments in writing in its name, or in any way as agent for it or to hold himself out as a general or special

agent, or partner of Licensor in any way except as hereinbefore specifically set forth and provided.

k. The Licensee, or its partners, or its executive officers or principal stockholders will not have any interest, financial or otherwise in any business which is in any way competitive with that of the Licensor throughout the term of the existence of this Franchise and License Agreement and for the period of three (3) years after any termination thereof, nor shall he or any of them take employment of any kind in any such competing business during the said period of three (3) years beyond the expiration of this License and Franchise Agreement.

l. Licensee shall conduct its business in the general manner provided therefore under this License and Franchise Agreement and shall make no material deviation therefrom without the prior written consent of the Licensor. Any question arising in connection therewith shall rest in the sole and absolute discretion of the Licensor and any violation thereof shall at its option constitute a breach of this agreement.

m. All advertising to be placed by Licensee in newspapers, periodicals or signs for production by radio and television, and all forms and other printed matter used in connection with the conduct of such business shall be subject to the written approval of Licensor as to content, form, quality of the printing and the paper proposed to be used before being used.

6. The term of the License granted hereunder is for one year commencing on the date of the execution hereunder unless such term shall be sooner terminated in accordance with the provisions hereof, and shall be renewed automatically thereafter from year to year unless the Licensee herein shall give written notice to the Licensor of his desire to terminate this agreement not later than sixty (60) days prior to the end of the then current term.

7. The Licensee agrees to comply in all respects with all laws, statutes, rules and regulations, Federal, State, County and Municipal, and of all other governmental authorities that may be necessary for or incident to the conduct of its business as such Licensee and Franchise holder under the terms of this agreement at its own cost and expense, and upon demand, to furnish appropriate evidence of such compliance to the Licensor; and the Licensee hereby agrees to indemnify the Licensor and to hold it harmless against any possible claims against it, and to reimburse any expenses it may have including legal fees for any failure of the Licensee to fully comply therewith.

8. Licensee recognizes that the branch office to be opened by Licensee hereunder will be a component of many such branch offices operated by various Licensees throughout the country, and to insure substantial uniformity throughout such branch offices, Licensee agrees to conform to any and all instructions of Licensor regarding basic policies pertaining to the conduct of such business by Licensee

hereunder, which policy shall include but not be limited to advertising, management, sales policies, methods of inspection and operating procedures and techniques.

9. If Licensee shall fail to perform, keep and observe any covenant, term or condition of this agreement, or fails for a reasonable period of time to maintain the volume of business that is done by other Licensees in comparable areas, a default hereunder shall be deemed to exist. This License and Franchise is granted subject to the specific condition that if a default hereunder on the part of Licensee is not cured within thirty days after written notice of default delivered by Licensor to Licensee, the Licensee and Franchise herein granted may be forthwith terminated by Licensor but without prejudice to any other rights or remedies Licensor may have.

10. No car over five years old (five model years) shall be inspected for Warranty. Licensor shall have the right at any and all times to re-inspect any cars inspected hereunder to see that its inspection standards and requirements are being maintained. Three such re-inspection visits per year shall be paid for by Licensee, at cost, which cost shall be actual salary plus expenses, not to exceed \$200 per visit. Should the Warranty loss ratio on cars approved by Licensee exceed Sixty percent (60%), Licensor may cancel this franchise forthwith.

11. In the event that Licensee shall file a voluntary or involuntary petition in bankruptcy, or a

petition for relief under any Federal or State bankruptcy or insolvency laws, this agreement shall forthwith terminate upon the date of the filing thereof.

In the event that a petition for relief under any Federal or State Bankruptcy or insolvency laws shall be filed against Licensee and any and all such proceedings are not completed and discharged within thirty (30) days, or in the event of the involuntary dissolution of Licensee, this agreement shall forthwith terminate.

12. Licensee shall not sell, transfer, assign, sublicense, mortgage or pledge this agreement or any rights or privileges accruing hereunder, to any person, firm or corporation without the written consent of Licensor first had and obtained and in the event the Licensee shall be a Corporation there shall be no sale or transfer of stock to others without the written consent of the Licensor.

13. Licensee agrees to maintain adequate Workmen's Compensation and Employers' Liability Insurance, and to make any and all requisite withholding, social security payments and/or taxes in accordance with the laws of the United States and the territories named herein.

14. This agreement shall not be deemed to create any relationship of agency, partnership or joint venture between the parties hereto. No employee engaged by Licensee shall, under any circumstances,

be deemed to be an employee of Licensor, and all employees engaged by Licensee shall be so notified.

15. Any notice required to be given pursuant hereto shall be mailed to

Licensor: National Bonded Cars Inc., 1965 Morris Avenue, Union, New Jersey.

Licensee: Address given as soon as office is established.

16. The failure of the Licensor to insist, in any one or more instances, upon strict performance of any one or more of the terms and conditions of this agreement, or to exercise any rights hereunder, shall not be construed as a waiver thereof, but the same shall continue and remain in full force and effect.

17. This agreement contains the entire agreement between Licensor and Licensee, and any agreements hereafter made shall be ineffective to change, modify or discharge it in whole or in part unless such agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.

18. This agreement shall be construed interpreted in accordance with the provisions of the laws of the State of New Jersey.

In Witness Whereof, the undersigned have executed this agreement the day and year first above written.

In the presence of:

NATIONAL BONDED CARS
INC.,

By /s/ HARRY S. CAMPBELL,
President;

By /s/ C. WESLEY MILBURN,
Treasurer;

By /s/ EUGENE B. O'BRIEN,
/s/ A. E. HACKING, JR.,
Licensees.

/s/ P. B. THOMPSON.

EXHIBIT "D"

Area Franchise Agreement

Agreement made in Springfield, New Jersey, the 8th day of October, 1956, by and between National Bonded Cars, Inc., a New Jersey Corporation having its principal office and place of business at 120 Morris Avenue in the Township of Springfield, County of Union and State of New Jersey, (hereinafter called "Company") and Albert E. Hacking (hereinafter called "Area Representative").

Witnesseth:

Whereas, the Company is the owner of certain ideas, forms, plans, system and knowledge for en-

gaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of a warranty in connection therewith, and has developed and practically applied such forms and system of doing business, as qualified automotive experts, to its inspections, general procedure, repair procedure and the manner of verifying and paying the costs of repairs covered by said warranty in actual business operation, and

Whereas, the Area Representative is desirous of securing an area representative agreement to conduct the aforesaid business of the Company in the following territory viz.: The following counties attached to and made a part of this area franchise agreement:

Southern California—District #1

That portion of the State of California which includes the following counties: Santa Barbara, Ventura, Los Angeles, San Luis Obispo, Kern, Inyo.
and

Whereas, the Company is desirous of aiding the Area Representative therein, and in providing itself and other Area Representatives with its said ideas, forms, plans, system and knowledge of doing business, including the general procedure, method and extent of inspection method and control of the issuance of warranties, repair procedure, and the manner of verifying and paying of all costs of repairs covered by our warranty, as developed, adopted,

and carried out by it in the conduct of its said business, now and as hereinafter may be modified by it from time to time.

Now, Therefore, it is mutually agreed as follows:

1. Company hereby grants an exclusive area representative agreement to Area Representative to use on behalf of the Company its aforesaid ideas, forms, plans, system and knowledge for the making of such automobile inspections and the issuance of the certification and warranty incidental thereto on approved new or used cars within the territory described herein.

2. All business done by the Area Representative shall be conducted for its own account as Area Representative hereunder, except as set forth in paragraph 1, above, and it shall use the name of the Company on the door of its office, its stationery and forms, but only to such extent and in such manner as may be approved from time to time by the Company in writing, it being the intent of the Company that they be only in such form and manner as will in no way subject the Company to any liability of any kind, nature, or description to any third parties with whom Area Representative may do business except as herein specifically authorized and under the terms of duly signed dealer's contracts with the Company, inspections made thereunder and duly issued warranties of the Company to the respective holders thereof. All contracts with dealers must be

confirmed by the Company at its home office in writing before becoming effective.

3. Area Representative agrees to accept any and all new ideas, plans, forms, systems, advertising copy, and improvements or changes in the method of the conduction of such business as may be developed hereunder and to change or modify its operation in accordance with any and all instructions immediately upon receipt thereof from the Company.

4. It is clearly understood that Area Representative is to pay all expenses in connection with the operation of its office in the territory, and all expenses in connection with the obligations assumed by Area Representative under this agreement out of the pay received by it from the Company as follows:

The Company agrees to pay to the Area Representative Nine (\$9.00) Dollars for each approved vehicle, for which the Company has received its prescribed fee and an inspection report and approval; Four Dollars and Fifty Cents (\$4.50) for each rejected car for which the Company has received its prescribed fee and inspection report and rejection; and Four Dollars and Fifty Cents (\$4.50) for each rejected car that is reinspected and approved for which the Company has received its prescribed fee and reinspection report and approval.

5. Area Representative agrees as follows:

a. To merchandise the inspection service and warranty of National Bonded Cars, Inc., at a price per vehicle prescribed by it.

b. To remit to the Company immediately on collection, at its home office, the total amount of all monies collected by it for each inspection made hereunder, both when the inspected automobile is rejected for warranty, and when the inspected vehicle is approved and a warranty duly issued.

c. To use only the form of Dealer's Agreement prescribed and authorized by National Bonded Cars, Inc., and to limit its use strictly to new car dealers.

d. To require that all checks for payments made upon inspection, and at the time of issuance of a warranty by a dealer to the purchaser of a car be made out to National Bonded Cars, Inc., and remitted to it forthwith by the Area Representative.

e. To keep true and correct books and accounts in accordance with the bookkeeping system recommended by the Company. The Area Representative shall pay the entire cost of establishing, maintaining, and auditing the books and records as required hereunder. These books and records shall be available for inspection by the Company for its duly authorized representative during all regular business hours.

f. To provide an appropriate office for the conducting of such business in said territory.

g. To employ such salesmen, inspectors, office help, and other employees as may be necessary to carry out its aforesaid business within said territory and to maintain in form satisfactory to the Company adequate unemployment and liability insurance covering such employees and any automobiles that may operate in connection with their business activities, in form and amount satisfactory to the Company and with the issuance of appropriate Certificates of Insurance to the Company for its proper protection in connection therewith. Particular care shall be used in the selection and hiring of inspectors, the employment of whom must be previously approved in writing by the Company and whose continued employment as such inspectors must at all times remain completely satisfactory to the Company.

h. To maintain a separate local bank account in the name of the Area Representative for the sole purpose of the conduct of its business as Area Representative which shall be opened at the time Area Representative commences business. A statement of this account shall be made available to the Company whenever demanded by it in writing, and all statements of this account covering the entire period of its existence shall likewise be available to the Company at any time upon demand.

i. To devote its full time and attention and best efforts exclusively to the conduct of said business under this area representative agreement and to use its best efforts to procure conscientious inspec-

tors, salesmen and other employees, the names, addresses and qualifications of which shall be sent to Company immediately upon their hiring, and further agrees that he will discharge any and all employees designated by the Company as failing to come up to the standard required by the Company. Particular care will be used in the supervision of the activities of all inspectors, who will act as agents of the Company in making inspections; in checking automobiles when repairs have been requested; and in issuing drafts on the Company in payment of repair bills for approved repairs. No inspectors will be hired until approved by the Company and fully trained by it for the exercise of their duties, and in such exercise will adhere rigidly to the requirements of the inspection manual and any other instructions, directions, or requirements of the Company concerning method and extent of their activities.

j. That as Area Representative it shall be solely responsible for all costs and expenses in connection with the establishment and maintenance of the said business, and for taxes and levies of any and all kinds in connection therewith, and the income of the Area Representative arising therefrom, and that Company shall not be liable for any such expenses, taxes, levies or disbursements paid or incurred in connection with the establishment and maintenance of said business, and Area Representative agrees to indemnify and hold Company harmless from any and all claims, law suits, demands and other causes

of action that may arise or be asserted against Company by reason of the establishment and maintenance of the aforesaid business by the Area Representative or by reason of Area Representative's use of the name of the Company and to reimburse it for all counsel fees and expenses in defending the same, and it is understood and agreed that in granting this Agreement, Company does not authorize or empower Area Representative to use its name in any other capacity than as provided hereunder, nor to enter into contracts, leases, or execute any other documents or instruments in writing in its name, or in any way as agent for it or to hold himself out as a general or special agent, or partner of Company, in any way except as herein specifically set forth and provided.

k. The Area Representative, or its partners, or its executive officers or principal stockholders will not have any interest, financial or otherwise in any business which is in any way competitive with that of the Company throughout the term of the existence of this Area Representative Agreement and for the period of three (3) years after any termination thereof, nor shall it or any one connected with it take employment of any kind in any such competing business during the same period of three (3) years beyond the expiration of this Area Representative Agreement.

l. Area Representative shall conduct its business in the manner provided hereunder, and shall make no material deviation therefrom without the prior

written consent of the Company. Any question arising in connection therewith shall rest in the sole and absolute discretion of the Company, and any violation thereof shall at its option constitute a breach of this agreement.

m. All advertising to be placed by Area Representative in newspapers, periodicals or signs and for production by radio and television, and all forms and other printed matter used in connection with the conduct of such business shall be subject to the written approval of Company as to content, form, quality of the printing and the paper proposed to be used before being used.

6. The term of this agreement is for one year commencing on the date of the execution hereof, unless such term shall be sooner terminated in accordance with the provisions hereof, and shall be renewed automatically thereafter from year to year so long as Area Representative performs to the satisfaction of the Company hereunder.

7. The Area Representative agrees to comply in all respects with all laws, statutes, rules and regulations, Federal, State, County and Municipal, and of all other governmental authorities that may be necessary for or incident to the conduct of its business as such Area Representative under the terms of this agreement at its own cost and expense, and upon demand, to furnish appropriate evidence of such compliance to the Company; and the Area Representative hereby agrees to indemnify the Company

and to hold it harmless against any possible claims against it, and to reimburse any expenses it may have including legal fees for any failure of the Area Representative to fully comply therewith.

8. Area Representative recognizes that the branch office to be opened by Area Representative hereunder will be a component of many such branch offices operated by various Area Representatives throughout the country, and to insure substantial uniformity throughout such branch offices, Area Representative agrees to conform to any and all instructions of Company regarding basic policies pertaining to the conduct of such business by Area Representative hereunder, which policy shall include but not be limited to advertising, management, sales policies, methods of inspection and operating procedures and techniques.

9. If Area Representative shall fail to perform, keep and observe any covenant, term or condition of this agreement, or fails for a reasonable period of time to maintain the volume of business that is done by other Area Representatives in comparable areas, a default hereunder shall be deemed to exist. This agreement is made subject to the specific condition that if a default hereunder on the part of Area Representative is not cured within thirty days after written notice of default delivered by Company to Area Representative, the agreement herein granted may be forthwith terminated by Company, but without prejudice to any other rights or remedies Company may have.

10. No car over five years old (five model years) shall be inspected for warranty. Area Representative will carefully supervise the work of all inspectors for the Company for and on its behalf to see that the requirements of the inspection manual, and training and direction of the Company covering such inspections be fully and carefully carried out by them in the making of all inspections for the Company. Company shall have the right at any and all times to reinspect any cars inspected hereunder to see that its inspection standards and requirements are being maintained. Regular periodic reinspections will be made by the chief inspectors from our home office at the Company's expense. Should the cost of approved repairs under the warranty on cars approved by inspectors supervised by Area Representative remain excessive after warning, in the sole and absolute discretion of the Company, the Company may cancel this agreement forthwith.

11. In the event that Area Representative shall file a voluntary or involuntary petition in bankruptcy, or a petition for relief under any Federal or State bankruptcy or insolvency laws, this agreement shall forthwith terminate upon the date of the filing thereof.

In the event that a petition for relief under any Federal or State Bankruptcy or insolvency laws shall be filed against Area Representative and any and all such proceedings are not completed and discharged within thirty (30) days, or in the event of

the involuntary dissolution of Area Representative, this agreement shall forthwith terminate.

12. Area Representative shall not sell, transfer, assign, mortgage or pledge this agreement or any rights or privileges accruing hereunder, to any person, firm or corporation without the written consent of Company first had and obtained and in the event the Area Representative shall be a Corporation there shall be no sale or transfer of stock to others without the written consent of the Company.

13. Area Representative agrees to provide and pay for adequate Workmen's Compensation and Employers' Liability Insurance, and to make any and all requisite withholding, social security payments and/or taxes in accordance with the laws of the United States and the territories named herein.

14. Area Representative agrees to pay for the training of its inspectors either in the field or at the home office. Such payment shall be limited to out of pocket and travel expenses, plus \$25.00 per day in the field, chargeable against payments to be made to Area Representative hereunder.

15. Time is of the essence of this Area Representative Agreement and the Area Representative agrees to have an office organized and in operation within thirty (30) days from the date of this agreement.

16. Any notice required to be given pursuant thereto shall be mailed to:

Company: National Bonded Cars, Inc., 120 Morris Avenue, Springfield, New Jersey.

Area Representative: Albert E. Hacking, 8224 Long Beach Blvd., Southgate, California.

17. The failure of the Company to insist, in any one or more instances, upon strict performance of any one or more of the terms and conditions of this agreement, or to exercise any rights hereunder, shall not be construed as a waiver thereof, but the same shall continue and remain in full force and effect.

18. This agreement contains the entire agreement between Company and Area Representative, and any agreements hereafter made shall be ineffective to change, modify or discharge it in whole or in part unless such agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.

19. This agreement shall be construed and interpreted in accordance with the provisions of the laws of the State of New Jersey.

In Witness Whereof, the undersigned have executed this Agreement the day and year first above written.

NATIONAL BONDED CARS,
INC.,

By /s/ HARRY S. CAMPBELL,
President;

By /s/ C. WESLEY MILBURN,
Treasurer;

By /s/ ALBERT E. HACKING,
Area Representative.

In the presence of:

/s/ P. B. THOMPSON.

[Endorsed]: Filed September 4, 1958.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR PRELIMINARY
INJUNCTION

Please Take Notice that, upon the verified complaint in the above-entitled action and the affidavit of Geoffrey K. Clowes, a copy of which is hereto annexed, before the Master Calendar Judge, in the Post Office Building in the City and County of San Francisco, State of California, on the 22nd day of September, 1958, at the opening of the Court on that day, or as soon thereafter as Counsel can be heard, a motion will be made for a preliminary injunction against the defendants herein in accordance with the prayer of said complaint, and for such other or further relief in the premises as to the Court may seem just and proper.

Dated: September 4, 1958.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed September 4, 1958.

[Title of District Court and Cause.]

MOTION FOR PRELIMINARY
INJUNCTION

Plaintiff moves the Court to grant a preliminary injunction pending the final determination of this action and until the further order of this court against:

1. Defendants Francis B. Ryan, Donald Brooks, A. E. Hacking, James Chambers, Truman Renz, National Bonded Cars of Southern California, Inc., Nation-Wide Automobile Dealers Insurance Agency and Nation-Wide Automobile Mechanical Insurance Agency, Inc., and each of the officers, directors and employees of said National Bonded Cars of Southern California, Inc., Nation-Wide Automobile Dealers Insurance Agency, Inc., and said Nation-Wide Automobile Mechanical Insurance Agency,

Inc., restraining them and each of them from engaging in the business of selling mechanical automobile warranties or in any similar business competitive with plaintiff's business,

2. Defendants Balboa Insurance Co. and The Central Agency of San Francisco, Incorporated, and each of their officers, directors and employees, restraining them and each of them from insuring mechanical automobile warranties or any similar guarantees issued by or through said Nation-Wide Automobile Dealers Insurance Agency and said Nation-Wide Automobile Mechanical Insurance Agency, Inc.,

3. Defendant Francis B. Ryan restraining him from acting or purporting to act as plaintiff's area representative in the States of California and Nevada, and

4. Defendants A. E. Hacking and National Bonded Cars of Southern California, Inc., restraining them and each of them from acting or purporting to act as plaintiff's area representatives in the States of California and Nevada,

on the grounds that unless restrained by this court said defendants will commit the acts referred to, which will result in irreparable injury, loss and damage to plaintiff during the pendency of this action, as more fully appears from the verified complaint herein and the affidavit of Geoffrey K. Clowes attached hereto and made a part hereof.

Dated: September 4, 1958.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed September 4, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF GEOFFREY K. CLOWES IN
SUPPORT OF PRELIMINARY INJUNCTION

State of California,
City and County of San Francisco—ss.

Geoffrey K. Clowes, being duly sworn, deposes
and says:

1. I am a Vice President of National Bonded Cars, Inc., the plaintiff in the above entitled action and I make this affidavit in support of plaintiff's motion for a preliminary injunction herein.

2. Hereinafter in this affidavit the various defendants herein shall be referred to by the same names as they are referred to in the complaint.

3. Early in 1956, having entered into an area representative agreement with plaintiff covering the territory of Northern California and Nevada, Ryan came to San Francisco, took up residence in the

Richelieu Hotel and commenced doing business from that address. Shortly after his arrival he rented desk space in the office of Central at 2456 Van Ness Avenue in San Francisco. With the assistance of the home office of plaintiff, Ryan was successful in establishing a chain of automobile dealers throughout his territory, who used plaintiff's warranty program. As the business grew, it became necessary for Ryan to employ both office and outside help, and among those so employed were Renz and Brooks as salesmen.

4. Early in 1956, Hacking and a Mr. Eugene B. O'Brien started operations in Southern California and Nevada as plaintiff's area representatives in that territory pursuant to written agreement with plaintiff. They established their office at 8224 Long Beach Blvd., Southgate, California. Subsequently, Hacking and O'Brien had a disagreement and, with the consent of plaintiff, in October, 1956, their territory was divided into two areas. Hacking then entered into a new agreement with plaintiff whereby he became plaintiff's area representative in the following counties in California: Santa Barbara, Ventura, Los Angeles, San Luis Obispo, Kern and Inyo. On or about November 21, 1957, Hacking assigned his area representation agreement with plaintiff to National Bonded Cars of Southern California, Inc., which thereafter technically acted as plaintiff's area representative in the territory covered by said agreement. Hacking continued, however, to operate plaintiff's business in said territory since National

Bonded Cars of Southern California, Inc., was wholly controlled by him and Chambers whom Hacking employed to assist him. During 1956 and 1957 Hacking was successful in establishing plaintiff's program with a large number of dealers in his territory.

5. Late in 1957, Ryan and Hacking began exploring the possibility of setting up their own organizations, independent of plaintiff, to engage in the same business as plaintiff in competition with plaintiff. In order to do this, it was necessary to find an insurance carrier to underwrite the performance of the mechanical automobile warranties to be issued by the new organizations proposed to be formed by Ryan and Hacking. Accordingly, Lynch, an insurance broker in San Francisco, was requested to negotiate with a number of insurance companies with this end in view. On January 10, 1958, Lynch arranged a meeting in San Francisco with a Mr. A. Morganstern, Chairman of the Board of Resolute Insurance Company of Hartford, Connecticut. At this meeting, in addition to Mr. Morganstern, there were present Mr. Jack Kiehl, resident Vice President of Resolute Insurance Company in California, Ryan and Renz. Nothing came of this meeting and, thereafter, Lynch, on behalf of Ryan and Hacking, approached other insurance companies, including Balboa, Balfour-Guthrie, Argonaut and Premier. During these negotiations, Ryan, Hacking and Lynch were closely assisted by Robertson, one of the principals of Central, the general agents for Balboa.

6. As part of these negotiations it was necessary to provide statistics to insurance companies relating to the loss ratio experience in plaintiff's business and this highly confidential information was given by Ryan and Hacking. In this regard, and at the direct request of a Mr. Devany, Executive Vice President of Balboa, Robertson made a detailed and exhaustive examination of all of Ryan's and Hacking's records in the operation of plaintiff's business in both Northern and Southern California.

7. Early in 1958, an agreement was finally entered into whereby Balboa, through Central, agreed to insure the mechanical automobile warranties to be issued by the new organizations to be formed by Ryan and Hacking. At about the same time, Ryan, Renz and Brooks created NADIA for the purpose of engaging in the business of issuing mechanical automobile warranties in Northern California and Nevada, and Hacking and Chambers created NAMIA for the same purpose in Southern California and Nevada. Ryan's name was intentionally concealed as a principal in NADIA and Hacking's name was likewise concealed as a principal in NAMIA.

8. At all times hereinbefore mentioned, Robertson, Lynch, Balboa, Central, NADIA and NAMIA were fully aware of the terms and conditions of the area representative agreements which both Ryan and Hacking had with plaintiff.

9. In May, 1958, NADIA and NAMIA were ready to and did commence operations. NADIA's

offices were the same as Central's in San Francisco, and NAMIA's offices were at plaintiff's office in Southgate.

10. At this time, Central sent out a letter to all of its dealers in Northern California announcing the availability of the new mechanical auto warranty program and advising those interested to contact NADIA. Following this, an immediate drive was made by Ryan's outside representatives, both salesmen and inspectors, who were ostensibly associated with plaintiff's business, to switch plaintiff's dealers and accounts from plaintiff's program to the NADIA program. In this drive considerable assistance was lent by Central's sales organization. Ryan's plan was to convert as many of the dealers as possible outside the County of San Francisco. He deliberately avoided trying to switch San Francisco dealers in order to avoid the possibility of anyone from plaintiff's home office visiting San Francisco and detecting the subterfuge. During the months of May, June and July, 1958, all of Ryan's personnel was used to work on both plaintiff's and NADIA's business with emphasis on the latter. It is known that many of the dealers who switched from plaintiff to NADIA were led to believe that NADIA's plan was plaintiff's new insurance program.

That this is so is evidenced by the fact that at least one dealer actually sent to plaintiff's office in San Francisco five separate checks, payable to plaintiff's order, for premiums on NADIA warranties

sold through such dealer. A copy of one of such checks and the NADIA voucher attached thereto is annexed hereto as Exhibit I. NADIA attempted to foster this belief by using the same inspection reports as are used by plaintiff.

11. Hacking followed the same general pattern to switch dealers from plaintiff to NAMIA in Southern California as was followed by Ryan for NADIA in Northern California. Plaintiff's inspection reports have been used by NAMIA and a conscious effort has been made to induce dealers in that territory to believe that NAMIA's program is plaintiff's new insurance plan. Hacking's fraudulent disloyalty to plaintiff is accentuated by the fact that during the period from January 20, 1958, to June 13, 1958, he was, in addition to being plaintiff's area representative in Southern California, also a salaried employee of plaintiff. During said period, he was specifically employed by plaintiff at a salary of \$192.32 per week plus expenses to do field work in the conduct of plaintiff's business in the Southern part of the United States. During said period, in which Hacking created and actually started the operation of NAMIA, Hacking received the sum of \$6,546.47 from plaintiff as salary and expenses for his services.

12. The devastating effect on plaintiff's business resulting from the entry of NADIA and NAMIA into the automobile warranty business is graphically illustrated by the following chart which shows the number of cars inspected for warranty

under plaintiff's program in Ryan's and Hacking's territories during the months of January through July, 1958:

Territory	Jan.	Feb.	March	April	May	June	July
Ryan	966	811	897	865	804	345	142
Hacking	698	585	636	480	450	247	271

The marked drop in inspections in the months of June and July can only have been caused by the aforementioned fraudulent misconduct of Ryan and Hacking and their confederates.

13. Since the end of November, 1957, Ryan, to use his words, has been causing plaintiff's warranty certificates to be issued on "anything that rolls." On the other hand, since the creation of NADIA, he has stressed the importance of rigid inspections given to cars submitted for warranty under the NADIA plan. Hacking, like Ryan, has admitted that since November, 1957, "anything with wheels on" has been bonded for warranty by plaintiff. However, the most rigid inspection standards have been maintained for cars submitted for warranty to NAMIA. As a result of Ryan's and Hacking's indiscriminate acceptance of automobiles for bonding by plaintiff, plaintiff has suffered and will continue to suffer excessive losses from claims.

14. I did not become associated with plaintiff until about July 28, 1958. Before that time, and, in fact, early in January, 1958, I met with Ryan and others at Bardelli's Restaurant in San Francisco. At that meeting Ryan stated that he was in

the process of negotiating with a number of insurance companies for the purpose of starting his own program entirely independent of plaintiff's business. He stressed the fact that he was going to try and get as many of plaintiff's area representatives as possible to do the same thing. He also stated that Hacking was helping him and that they were working on a partnership deal together for the whole State of California. He went on further to say that he had an appointment with Hacking in Los Angeles on the following day for the purpose of discussing their proposed new program with an insurance company.

15. I met again with Ryan and others in May, 1958, in San Francisco. At that time Ryan informed me that he had entered into a partnership with Renz and Brooks in which he, Ryan, had a 62% interest, Renz a 28% interest and Brooks a 10% interest, but that only Brooks' name would appear as proprietor of the business, said business being NADIA. At the same time he stated that he and his personnel were switching as many of plaintiff's dealers as possible over to NADIA and that they were working closely in conjunction with Central. He also stated that his new organization was set up so that it would be impossible for anyone to detect Ryan's association with it.

16. At the end of June, 1958, I again met with Ryan and others at the Newarker Restaurant, Newark Airport, Newark, New Jersey. At this meeting, Ryan openly admitted his association with

NADIA, his partnership with Renz and Brooks and the fact that he had already converted most of plaintiff's dealers over to his new operation. He stated that for all intents and purposes plaintiff's business on the West Coast was dead. He admitted that he had had many conversations with many of plaintiff's other area representatives and had encouraged them to start their own business and to divorce themselves from plaintiff.

17. Finally, at a meeting on July 14, 1958, at plaintiff's home office in Springfield, New Jersey, Ryan repeated the foregoing statements to Mr. Carl Baer and Mr. Raymond Biersach, vice presidents of plaintiff. This was the first time that plaintiff acquired concrete evidence of Ryan's and Hacking's activities, in violation of their area representative agreements.

18. On July 28, 1958, I met with Ryan, Robertson and others in San Francisco. During the course of our conversation, Robertson admitted to having negotiated the deal between Balboa and NADIA and NAMIA which he had been able to do after having access to and making an exhaustive investigation of plaintiff's confidential records in Ryan's possession. He further stated that all of this information had been submitted for examination to the aforementioned Mr. Devany of Balboa. He also stated that Central's sales force of eight men were actively engaged in soliciting business for NADIA and that he had complete control over all of the dealers who had been using plaintiff's program.

19. At a meeting between the aforementioned Mr. Devany and James E. Smith, president of plaintiff, in Los Angeles on August 5, 1958, Mr. Devany admitted to Mr. Smith that he had personally met Ryan, and had examined plaintiff's loss ratio statistics which Robertson had obtained for him and that on the basis of these he had approved the underwriting of NADIA's and NAMIA's programs by Balboa.

20. Other evidences of Hacking's and Ryan's malicious and wilful misconduct during the period of their representation of plaintiff have come to my attention. I have been advised that kickbacks from repair shops who were employed to do plaintiff's business in Hacking's territory have been demanded and received and that fictitious claims from said territories have been presented to and paid by plaintiff. Plaintiff is now investigating these matters and criminal action may be indicated. Furthermore, an employee of Hacking's has informed me that he recently discovered claims on warranties issued by plaintiff in excess of \$50,000.00 lying unprocessed in Hacking's desk. In addition, as recently as August 4, 1958, I have had individuals call plaintiff's office in San Francisco and state that they were interested in purchasing a warranty from plaintiff. The young lady in plaintiff's office who answered the telephone tried to persuade the callers to purchase a NADIA warranty.

21. The damage done to plaintiff's reputation and good will with its dealer accounts and custom-

ers, as well as with its area representatives, on the West Coast can probably never be undone. The economic losses suffered by plaintiff in said area as a result of the malicious and wilful misconduct of the foregoing defendants is enormous. Every day that NADIA and NAMIA continue to engage in the business of selling mechanical automobile warranties by the use of plaintiff's confidential trade secrets and fraudulent misrepresentation serves to further confound and confuse the relationship between plaintiff and NADIA and NAMIA and further encourage plaintiff's dealer accounts and customers who have not already switched to NADIA's and NAMIA's plan to make such a switch. Unless a preliminary injunction is granted herein, plaintiff's entire business on the West Coast will be so irreparably damaged and irretrievably lost as to make the further operation of its business in said area a complete impossibility.

/s/ GEOFFREY K. CLOWES.

Subscribed and sworn to before me this 2nd day of September, 1958.

[Seal] /s/ HALLIE KELLER,
Notary Public in and for Said City and County,
State of California.

My commission expires 11-17-61.

EXHIBIT NO. 1

CAMERON-STEWART PONTIAC-CADILLAC, INC.
 CHICAGO - PONTIAC - G.M.C. - VENTURA
 2nd & Wall Streets - Phone 3-3500
 CHICGO, CALIFORNIA

Nº 1565

PAY August 26 1958 82-1228
1211
 TO THE ORDER OF NATIONAL BOND CORP. *** 15 DOLS 00 CTS \$ 35.00

National Bonded Corp, Inc.
 110 Sutter St.
 San Francisco, 4, Calif.
 Attn: Mr. Hal Lewis

CAMERON-STEWART PONTIAC-CADILLAC, INC.
 BY [Signature]
 BY _____

CHICGO OFFICE
 CROCKER-ANGLO NATIONAL BANK
 2001 THIRD & MAIN
 CHICGO, CALIFORNIA

EMPLOYEE'S NAME										
CAMERON-STEWART PONTIAC-CADILLAC, INC. CHICGO, CALIFORNIA										
PAY PERIOD	GROSS EARNINGS	DEDUCTIONS								
		WITH TAX	F.O.A.B.	G.O.I.	V.O.	G. HOSP.	A.O.	ADVANCED	TOTAL	BALANCE F.O.B.

EMPLOYEE THIS IS A STATEMENT OF YOUR EARNINGS AND DEDUCTIONS FOR THE PERIOD INDICATED. KEEP THIS FOR YOUR PERMANENT RECORD.

DATE	STATEMENT	INVOICE	DISCOUNT	NET
	Bond #4442, 55 Buick, Eng. 782045945 stk 8-1278, Harvey Truxes	631		35.00

APPROVAL ATTACHED CHECKS SHALL CONSTITUTE APPROVAL AND SATISFACTION OF ALL ITEMS AS STATED ON A ACCOUNT

OWNER OF 1955 Buick 782045945
 Year Make Serial No. Month

Cameron Stewart
 Lessee
Chico Calif
N.P. Stewart
 Date

8-1278

Dealer's Store Number

4442
 Bond Title No. Month Year
 Date of Purchase
Nº 4442
HARVEY TRUXES
 (Signature)
Harvey Truxes
 (Signature)
1647 BROADWAY
 Street Address (Print or Type)
CHICO CALIF
 City (Print or Type)

NATIONWIDE AUTO DEALERS INSURANCE AGENCY
 2446 Van Ness Avenue
 San Francisco, Calif. Phone ORdway 3-1500

Endorsed: Filed September 4, 1958, Exhibit I

[Title of District Court and Cause.]

ANSWER OF DEFENDANT
DONALD D. LYNCH

Now Comes Donald D. Lynch, sued herein as Donald D. Lynch, and in answer to the complaint on file herein admits, denies and alleges as follows:

I.

As to the paragraphs of said complaint numbered 1 through 25 they appear to refer to other parties to the action and not to this defendant. This defendant has no knowledge, information and belief sufficient to answer the same and therefore denies each and every one of the allegations thereof.

II.

In answer to paragraph 26 of said complaint which is a part of Count V thereof this defendant denies each and every allegation contained therein.

III.

In answer to paragraph 27 of said complaint contained in Count V thereof this defendant denies the allegations thereof, and particularly denies that he conspired with the other defendants or anyone else in relation to plaintiff's business or at all.

IV.

In answer to paragraph 28 of said complaint this defendant denies inducing anybody to disclose any trade secrets to anybody and in this connection this

defendant denies that there were any trade secrets on the ground that he has no knowledge, information or belief sufficient to discuss them.

Wherefor, defendant Donald B. Lynch prays that plaintiff take nothing by virtue of his complaint and that this defendant be dismissed with his costs.

/s/ E. WALTER LYNCH,
Attorney for Defendant
Donald D. Lynch.

Duly verified.

[Endorsed]: Filed September 25, 1958.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT
AND COUNTERCLAIM

Comes now the defendant, A. E. Hacking, and answers plaintiff's Complaint as follows:

Answering Count III of plaintiff's Complaint, defendant alleges as follows:

I.

Defendant denies each and every allegation, and the whole thereof, of Paragraph 17, both generally and specifically, except that defendant admits that the franchise agreement referred to in said Paragraph was assigned to the corporation.

II.

Defendant denies each and every allegation, and

the whole thereof, of Paragraphs 19 and 20 of said Count, both generally and specifically.

Answering Count IV of plaintiff's Complaint, defendant alleges as follows:

I.

Defendant reincorporates his denials to Paragraph 19 of Count III, to the same effect as though here fully set forth at length.

II.

Defendant denies each and every allegation, and the whole thereof, of Paragraphs 22, 23, 24 of Count IV, both generally and specifically, except that defendant admits that defendant, James Chambers, was in his employ in 1957.

Answering Count V of plaintiff's Complaint, defendant alleges as follows:

I.

Answering Paragraph 25, defendant reincorporates his allegations and denials to Paragraphs 1 through 24 of the Complaint, to the same effect as though here fully set forth at length.

II.

Defendant does not have sufficient information or belief to enable him to answer the allegations contained in Paragraph 26 and basing his denial on that ground, denies each and every allegation

therein contained, both generally and specifically; defendant denies that there were any trade secrets imparted to him from plaintiff, and denies that he disclosed any confidential information to any person whatsoever other than those in his employ or in the employ of plaintiff.

III.

Answering Paragraphs 27, 28 and 29 of plaintiff's Complaint, defendant denies each and every allegation, and the whole thereof, therein contained, generally and specifically, insofar as said allegations pertain to said defendant.

Counterclaim

Count One

I.

On May 23, 1958, defendant and Donald J. Rackemann entered into an agreement in writing under which defendant agreed to sell and said Rackemann agreed to purchase three thousand (3,000) shares of stock, standing in the name of this defendant, of National Bonded Cars of Southern California, Inc., a California corporation, being all of the issued and outstanding shares of stock of said corporation, for a consideration of \$10,000.00. In addition, said Rackemann agreed to assume liability for and indemnify this defendant against all outstanding debts and obligations of said corporation as of May 23, 1958, and thereafter.

II.

Defendant has fully performed all of the terms and conditions and covenants in said agreement on his part to be performed.

III.

Because of plaintiffs' solicitation, counsel and advice to said Rackemann, the latter has failed and refused to perform any of the terms, conditions and covenants in said agreement on his part to be performed.

IV.

Due to plaintiffs' solicitation, counsel and advice to said Rackemann, as aforesaid, defendant has been damaged in the sum of \$10,000.00, as the purchase price of said stock, and in the further sum of \$5,000.00, represented by debts and obligations of said corporation assumed by Rackemann in said written agreement, all of which said Rackemann has failed and refused to pay, on plaintiffs' advice, as aforesaid, although requested so to do by defendant.

Count Two

I.

On January 20, 1958, plaintiff employed this defendant for a period of one year at an annual salary of \$10,000.00, plus expenses. Said employment agreement was put in writing in the form of a letter dated January 20, 1958, addressed to this defendant and executed by plaintiff, a copy of which letter is attached hereto as Exhibit "A" and by

this reference incorporated herein and made a part hereof.

II.

That defendant entered upon the performance of said employment agreement and fully performed all of the terms and conditions thereof on his part to be performed until prevented therefrom by plaintiff on June 13, 1958.

III.

That on June 13, 1958, plaintiff discharged this defendant, without cause, and failed and refused to pay him any further compensation or expenses.

IV.

That defendant has been unable, since said date of June 13, 1958, to obtain other similar employment.

V.

That prior to said wrongful discharge of defendant from his said employment, as aforesaid, plaintiff had paid to defendant under said employment agreement compensation at the rate of \$10,000.00 a year for the period from January 20, 1958, to June 31, 1958, in the approximate sum of \$3,956.00, and that the balance in the approximate sum of \$6,044.00 is now due, owing and unpaid from plaintiff to defendant, as compensation; that defendant incurred business expenses under said employment agreement for which plaintiff has failed and refused to reimburse defendant, in the approximate sum of \$200.00, which sum is also due, owing and unpaid from plaintiff to this defendant.

Wherefore, defendant demands:

(1) That the relief demanded in plaintiff's complaint be denied as to this defendant;

(2) That the Court discharge this defendant from all liability in the premises;

(3) That the Court award judgment in favor of this defendant and against plaintiff, on the First Count of this defendant's Counterclaim, in the sum of \$15,000.00, plus interest at the legal rate from May 23, 1958;

(4) That the Court award judgment in favor of this defendant and against plaintiff, on the Second Count of this defendant's Counterclaim, in the sum of \$6,244.00, plus interest at the legal rate from June 13, 1958.

(5) That the Court award to this defendant his costs of suit and attorney's fees; and

(6) For such other and further relief as to the Court seems just and proper.

/s/ JOHN D. GRAY,

Attorney for Defendant

A. E. Hacking.

EXHIBIT A

National Bonded Cars, Inc.

Executive Offices: 120 Morris Avenue, Springfield,
N. J., DRexel 6-4900

January 20, 1958.

Mr. A. E. Hacking,
National Bonded Cars of Southern California,
8224 Long Beach Boulevard,
South Gate, California.

Dear Mr. Hacking:

In accordance with our discussions and your discussions with Mr. Pitt, National Bonded Cars, Inc., hereby agrees to put you on the payroll at an annual sum of \$10,000.00. You will, of course, be reimbursed for all expenses and be given a \$60.00 depreciation car allowance, and a gas credit card.

In addition to the salary sum, you will receive a bonus payable at the end of each sixty days. This bonus is to be calculated upon the increased business received from the areas in which you are working, or have worked and will be as a result of your own efforts. This will be calculated at the sum of 15% of the increased monies retained from the net amount of money received in handling by National Bonded Cars, and is not in anyway to be calculated on the \$9.00 fee which is the cost of running the operation, and also is not in anyway to be calculated on any monies received and reserved for insurance.

It is understood that this arrangement is in order for Mr. Hacking to prove his ability and worth to National Bonded Cars, and at the end of the six months period, he will meet with Mr. Milburn and Mr. Pitt to determine a permanent connection and position with the company, and to further discuss his interests in his current franchise in Southern California.

The bonus arrangement is figured for a period of one year from the date that he has worked in an area.

Very truly yours,

NATIONAL BONDED CARS,
INC.,

/s/ WESS,

C. WESLEY MILBURN,
President.

CWM:h

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF C. J. SCHNABEL

State of California,

City and County of San Francisco—ss.

C. J. Schnabel, being first duly sworn, deposes and says:

That I am connected with the Voss Motor Company, automobile dealers with offices at 132 Monterey Street, Salinas, California.

I was first associated with National Bonded Cars, and sold their used car warranty as general manager of Charles French Motors in Oakland beginning in 1955.

After a satisfactory relationship with National Bonded Cars at Charles French Motors, I purchased an interest in Voss Motor Company of Salinas and immediately arranged to sell the automobile warranty to the customers of my new company.

These automobile warranties were a problem to finance. Because it could not be listed separately on the customer's contract, the bank financing a sale hesitated to include it in the price of the automobile. The bank was hesitant because of their rulings on the auto value amounts they will finance in ratio to the commercially recognized value of the automobile. Therefore, I was often confronted with collecting for the auto warranty in cash or giving the warranty away to the customer—either method being quite a hardship for the Voss Motor Company.

During the later part of the year 1957 I was informed that the Attorney General of the State of California had ruled that the auto warranty companies would necessarily have to conform to the insurance laws of the State of California rather

than operating strictly as service companies. I then contacted National Bonded Cars and asked them if I was proceeding legally by selling their bond, in view of this ruling of the Attorney General. They replied that their home office had assured them that any continuance of the sale of their bond was legal and to pass this information on to their automobile dealers.

Neither I nor anyone connected with my company was ever contacted by the Balboa Insurance Company or Central Agency, Inc., acting in behalf of Balboa. On the contrary, and acting for Voss Motor Company, I personally contacted the Balboa Insurance Company for advice on the aforesaid matter, particularly in light of the Attorney General's opinion, and motivated by my long association with said Balboa Insurance Company. I was then told that the major insurance companies in the auto finance field of California, namely, Balboa and Premier, were developing a plan to help their automobile dealers who had accounts with them to give their customers an auto mechanical insurance which would definitely conform with all the insurance statutes of the State of California.

Since April of 1958 to the present time our claims submitted to National Bonded Cars, Inc., have been unduly delayed. A minimum of \$1,200.00 is now unpaid, dating back to April, 1958. These claims have been approved and we have been told that they are in the eastern office of National Bonded Cars, Inc., for check issuance. We have had to advance all the

monies for these claims and this is one of the reasons we decided to dispense with National Bonded Cars' services.

We have been selling Balboa Mechanical Insurance and have found it very satisfactory in light of claims services, claims payments and the general benefits we are giving to the customers. In addition, when we began selling the Balboa policy it was \$5.00 less in cost than the National Bonded Car warranty. My company is relieved to know that we are doing business with an established company like the Balboa Insurance Company with whom we have had excellent, satisfactory relations for at least seven years. My company decided to continue their long business association with said Balboa Insurance Company.

/s/ C. J. SCHNABEL.

Subscribed and sworn to before me this 29th day of September, 1958.

[Seal] /s/ FRANCES E. WALDION,
Notary Public in and for the City and County of
San Francisco, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF L. C. FOX

State of California,

City and County of San Francisco—ss.

L. C. Fox, being first duly sworn, deposes and says:

That I am President of Lou Fox, Inc., which company has, for many years last past, and now is doing business as an automobile dealer with offices at 2555 Shattuck Avenue, Berkeley, California.

Our company had done business with the National Bonded Cars, Inc., for a considerable period of time. However, we were not satisfied with our association due to what we considered unreasonable delay on their part in paying certain claims.

When the Balboa Insurance Company entered the one year New and Used Car Guarantee field we became very interested. We had enjoyed several years of fine relationships with the Balboa Insurance Company and at Central Agency, acting in behalf of said Balboa and we were pleased to direct our business to them. This was particularly true in view of the fact that their type of coverage was, in our opinion, complying in all respects with the insurance laws of the State of California.

/s/ L. C. FOX.

Subscribed and sworn to before me this 29th day of September, 1958.

[Seal] /s/ FRANCES E. WALDION,
Notary Public in and for the City and County of
San Francisco, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE KUHN

State of California,
City and County of San Francisco—ss.

George Kuhn, being first duly sworn, deposes and says:

That I am a used car manager connected with the Spencer Buick, Inc., automobile dealers with offices at 18th Avenue and Taraval, San Francisco, California. My concern changed its mechanical warranty insurance business from National Bonded Cars, Inc., to N.A.D.I.A. for the reason of the excessive price increase by National Bonded Cars.

The foregoing change of business was voluntary on my company's part and a matter of my company's own choice.

There was no pressure brought to bear or acts or conduct by Mr. Ryan or anyone connected with

N.A.D.I.A. which had any bearing on the above change of business.

/s/ GEORGE F. KUHN.

Subscribed and sworn to before me this 29th day of September, 1958.

[Seal] /s/ FRANCES E. WALDION,
Notary Public in and for the City and County of
San Francisco, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF VERNE F. GARRETT

State of California,

City and County of San Francisco—ss.

Verne F. Garrett, being first duly sworn, deposes and says:

That he is and for some time has been the General Manager of Crown Motor Sales, automobile dealers, with business offices at 780 High Street, Palo Alto, California.

Due to recent publicity regarding the various warranty companies issuing certificates for mechanical failure on new and used cars, I decided

that Balboa Insurance Company rendered the most likely mechanical insurance protection to ourselves and our customers.

Because of doing business with Balboa for approximately ten years last past I felt that this company could assure proper protection for our customers. I was not certain that companies such as National Bonded Cars, Inc., could. This was particularly true in light of an opinion of the Attorney General of the State of California disapproving of National Bonded's type of bond then being issued.

The Balboa mechanical insurance was likewise available to us at a lower cost.

/s/ VERNE F. GARRETT.

Subscribed and sworn to before me this 30th day of September, 1958.

[Seal] /s/ FRANCES E. WALDION,
Notary Public in and for the City and County of
San Francisco, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF DEFENDANTS
JACK L. ROBERTSON AND THE CENTRAL AGENCY OF SAN FRANCISCO,
INCORPORATED

State of California,

City and County of San Francisco—ss.

Jack L. Robertson, being first duly sworn, deposes and says:

That he resides at 23 Grijalva Drive, San Francisco, California;

That he is the Vice President of The Central Agency of San Francisco, Incorporated (hereinafter referred to as "Central Agency"), and has been since the corporation was formed; that he has been in the insurance business for approximately thirteen years.

That said Central Agency has been conducting and now conducts a general insurance agency business, specializing in insurance pertaining to the sale of automobiles. Central Agency conducts its business activities in the main, with approximately three hundred automobile dealers in northern California, who were and now are placing various forms of insurance through the facilities of the Central Agency. The Central Agency was and is the general agent for the Balboa Insurance Company and other insurance companies.

That on or about the month of June, 1956, Francis B. Ryan came to the office of Central Agency to inquire as to renting desk space. After discussing the type of business that Mr. Ryan proposed to conduct, that of bonding the dealers against mechanical defects pertaining to the sale of their automobiles, it was decided that Mr. Ryan's business would be compatible with the activities of the Central Agency and Mr. Ryan was sub-let space in the offices of Central Agency. Since Mr. Ryan was unacquainted in the area at that time, Central Agency was able to assist the growth of his car bonding business by referring automobile dealers to him and he to the dealers; that during this common office space arrangement Mr. Ryan and I discussed our mutual problems such as car production losses and each party became quite familiar with each other's type of business.

In May of 1957, due to the business growth of both Central Agency and Mr. Ryan's business, it was necessary for Mr. Ryan to find larger quarters. He thereafter moved next door to the Central Agency office located at 2446 Van Ness Avenue, San Francisco. In the latter part of 1957, Mr. Ryan suggested to your affiant that he wanted Balboa to insure the mechanical warranty business that he, Ryan, had been developing; affiant informed Ryan that neither the Central Agency or Balboa could have any dealings with him while he was under contract with the National Bonded Cars, Inc., a mechanical warranty company. Central Agency and Mr. Ryan continued a friendly and co-operative

relationship, Central Agency providing certain insurance needs for Mr. Ryan and recommended Mr. Ryan to their many auto dealers who were interested in car warranties.

Between May and December of 1957, approximately fifteen automobile mechanical warranty companies started business in California. When some of the warranty companies began defaulting in their obligations to the automobile dealers and general public, many of the automobile dealers inquired of the Central Agency when the Central Agency and Balboa were going to enter into the mechanical warranty field with a stable, trustworthy business upon which they could depend. Central Agency gave the suggestion only passing interest until November of 1957, when, at the request of the State Department of Insurance, Attorney General Edmund G. Brown rendered his Opinion that mechanical warranties as were being offered by the various companies were in fact contracts of insurance and not merely an inspection service. Subsequent to said Opinion of the Attorney General and on or about December 28, 1957, the Department of Insurance requested the National Bonded Cars, Inc., which was represented by Mr. Ryan, to cease issuing warranties until such time that they properly qualified as an insurance company. There was wide publicity given to the Attorney General's Opinion and the Cease and Desist Order throughout the State, which came to the attention of the dealers through their trade journals and newspapers; as a result of said publicity, Central Agency

and Balboa were flooded with requests from automobile dealers to enter the mechanical guaranty field with a form of coverage which would meet the requirements of the State Department of Insurance. Central Agency, therefore, started to study seriously the warranty business as it related to the needs of their many automobile dealer clients.

Approximately in the latter part of December, 1957, or the first part of January, 1958, Mr. Ryan again came to the Central Agency to discuss insurance matters and stated he was gravely concerned over the developments in the warranty field, in view of the Attorney General's Opinion and the Cease and Desist Order. That he foresaw the loss of his business in view of the fact that the National Bonded Cars, Inc., had no plans to comply with the requirements of the State Department of Insurance. I told him that Central Agency would study the matter and in all probability would enter the field at a later date. Mr. Ryan stated that his contract with the National Bonded Cars, Inc., had been breached by his company in many particulars, chiefly because of the Opinion of the Attorney General and the failure of the National Bonded Cars, Inc., to pay their claims to the dealers and also because they had failed to pay his, Ryan's, commissions. I informed Mr. Ryan that we could not do business with him irrespective of the fact that his contracts had been breached, until he had formally terminated his contract with the National Bonded Cars, Inc.

It was evident that, in view of the many requests for Central Agency and Balboa to enter the mechanical warranty insurance business, we would have to go into the business even though it would be to the disadvantage of Mr. Ryan, with whom we had had friendly relations.

In the latter part of December, 1957, I proposed to Balboa that we enter the mechanical guaranty field. Balboa indicated that because I was personally identified with them as a former Northern California Branch Manager and as Central Agency was their general agent, they would give Central Agency first consideration. Because Central Agency and Balboa were, either jointly or separately, associated with the majority of the major automobile dealers, our success in the production end of any mechanical guaranty venture was assured in advance.

I, therefore, in behalf of Central Agency, started to compile statistics, policy forms and other information necessary to determine how much coverage could be afforded and upon what terms. Mr. Ryan had previously told us of his losses, but in view of the fact that he had no idea of the general losses of the plaintiff company, no information of value was received from him pertaining to loss ratios. In endeavoring to ascertain the loss ratios of the various warranty insurance companies that were in the business and to determine the manner in which Balboa should enter the mechanical warranty business, Central Agency representatives contacted the Employers Insurance Group who had previously reinsured the National Bonded Cars, Inc.; Central

Agency also received information from Mr. A. Morganstern, Chairman of the Board of Resolute Insurance Company, who were also in the mechanical warranty business; information was also obtained from the Premier Insurance Company.

During the next several months Central Agency and Balboa worked on a policy form, rates and methods to be used in the inspection of cars for the purpose of determining their mechanical condition. Central Agency decided that it would be advisable to obtain the services of an experienced man to oversee the inspection proceedings. We then began negotiations with Donald Brooks, unemployed at the time, to obtain an insurance agent's license and to set up a servicing organization. Mr. Brooks obtained the license and was duly appointed an agent of Balboa Insurance Company. He set up his own business under the fictitious name of Nationwide Auto Dealers Insurance Agency (hereinafter referred to as NADIA). That about the same time James Chambers, who was unemployed, presented himself to Central Agency as a party interested in similar inspecting arrangements for the Los Angeles area. Mr. Chambers obtained his insurance license and was appointed by Balboa as their agent and opened his office under the fictitious name of Nationwide Auto Mechanical Insurance Agency (hereinafter referred to as NAMIA), in Lynwood, California. It was contemplated that Brooks, doing business as NADIA, and Chambers, doing business as NAMIA, would also engage in other insurance

activities in behalf of Central Agency and any other company with whom Brooks or Chambers elected to do business. Neither Central Agency nor your affiant have ever had any financial interest or control over the activities of NADIA or NAMIA. Central Agency has advertised and aided in the solicitation of business for these two service agency companies for the purpose of building up Balboa's mechanical guaranty insurance business. In this connection, affiant states that at no time did affiant or the Central Agency obtain any trade secrets of any sort or character from Ryan, or from Brooks or Chambers, or anyone connected with National Bonded Cars, Inc.

In May of 1958, Brooks rented space in Central Agency's office in San Francisco and Central Agency launched a sales program with a general announcement to all of its dealers and through its sales staff. Premier Insurance Company was also writing insurance for the automobile dealers doing business with Bank of America. The Automobile Mechanical Insurance Agency, general agent of Balfour Guthrie Insurance Company was also in this field. The competition between these companies for the warranty business was very keen. They offered an insurance arrangement which was not disapproved by the State Department of Insurance, that was lower in net cost to the automobile dealers. In addition, the coverage offered by Premier and Balboa was the coverage underwritten by well-known companies with whom the automobile dealers had

been doing business for many years. Affiant states that in the first half of the year 1958 there was a noticeable drop in the sales of automobiles; that the competition of the various insurance companies that entered into the field in 1958, plus the drop in sales of cars, together with the Opinion of the Attorney General of California and the Cease and Desist Order issued by the Department of Insurance, were the prime factors that caused the loss of business by the National Bonded Cars, Inc. It is noted in the Affidavit of Geoffrey K. Clowes, filed in behalf of plaintiff, that the drop in the business of Ryan and Hacking's territories while under contract with National Bonded Cars, Inc., started in January and February of 1958; Central Agency and Balboa did not enter the field until May of 1958.

Geoffrey K. Clowes, in his said Affidavit, states that a San Francisco broker named Donald Lynch was assisted by your affiant in negotiations with several insurance companies, in an effort to find an insurance outlet for Ryan and Hacking's business. This affiant denies this statement in its entirety and states furthermore that he never communicated with Mr. Lynch in any manner relative to the sale of any business relating to mechanical guarantees. This affiant denies the statement contained in paragraph 6 of Mr. Clowes' Affidavit that he, affiant, ever made a determined and exhaustive examination of all of Ryan's and Hacking's records in the operation of plaintiff's business in both

Northern and Southern California, nor did affiant look at their records in any respect. It was clear from previous discussions had with Ryan and from what he had learned from the warranty business while Ryan was renting desk space in Central Agency's offices, that his records would not be of a nature from which accurate information could be derived. Central Agency never did agree to provide Ryan or Hacking with a market to write mechanical insurance. No member of Central Agency has ever represented that Balboa, NADIA or NAMIA was, or is connected with National Bonded Cars, Inc., to anyone. There was never an attempt to carry on business under the guise of the National Bonded Cars, Inc. Over forty per cent of the accounts initially signed up by NADIA were taken from warranty companies other than National Bonded Cars, Inc., and many of the remainder had never had a connection with any mechanical guarantee concern. Affiant and Central Agency never agreed to insure mechanical automobile warranties to be issued by organizations formed by Ryan and Hacking. Affiant had no knowledge as to any interest Ryan may have had or was to have in NADIA, nor any interest Hacking had or was to have in NAMIA.

In reply to paragraph 18 of the Affidavit of Mr. Clowes, affiant admits that he participated in endeavoring to negotiate a deal between Balboa and NADIA. Affiant denies, however, that he had access to or made any investigation of plaintiff's con-

fidential records in Ryan's possession, or otherwise, nor did affiant make any statement to this effect at any meeting with Clowes. Affiant further denies that any such information from any of plaintiff's confidential records had been submitted for examination to one Mr. Devany of Balboa. Affiant further denies that he had any control over the dealers who had been using plaintiff's program.

In conclusion, if Central Agency is forced to discontinue doing business with Brooks and his trade-name of NADIA and Chambers and his trade name of NAMIA, it would result in a chaotic situation under which we would find it extremely difficult to render proper services to the members of the public and the automobile dealers who avail themselves of our program; our policies, written through Balboa, refer the customers to NADIA and NAMIA for claims adjustment and other services.

In building up an insurance program in connection with the mechanical warranty business of both NADIA and NAMIA, this affiant states that he and Central Agency did so by lawful and competitive means and at no time entered into any conspiracy with Ryan or any other person to do or perform any unlawful act, or to do or perform any act by unlawful means, nor in building up said program did affiant or Central Agency at any time induce or use any means to induce Ryan to breach any contract between plaintiff and Ryan or Hacking.

/s/ JACK L. ROBERTSON.

Subscribed and sworn to before me this 26th day of September, 1958.

[Seal] /s/ FRANCES E. WALDION,
Notary Public in and for the City and County of
San Francisco, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF DONALD BROOKS IN OP-
POSITION TO MOTION FOR PRELIMI-
NARY INJUNCTION

State of California,
City and County of San Francisco—ss.

Donald Brooks, being first duly sworn, deposes and says:

That he resides in the City of Oakland, County of Alameda, State of California.

That prior to meeting or having known defendant Francis B. Ryan, one of the defendants herein, and on or about September, 1956, affiant formed and headed as owner a company known as United Car Warranty Company, the purpose of which was to organize used car dealers to handle his warranty and in turn sell, or in some way pass these warranties on to their Customers, the purpose being to

warrant the mechanical parts of the customers' automobiles for one year.

After laying the necessary plans and trade operations, contracting with mechanics capable of inspecting the dealers' cars, affiant then edited forms and advertising material for use by said dealers. An office was rented in the Syndicate Building, Oakland, California, from which all business was to be conducted. All elements for the formula of a successful operation were at affiant's disposal, with the exception of an insurance company to underwrite said warranties. Between September, 1956, and May, 1957, affiant signed agreements with approximately thirty (30) used car dealers to inspect and warrant their cars and supply them with forms and advertising material, to assist them in the promotion of affiant's warranties. Subject to obtaining suitable insurance coverage. This affiant made every effort to obtain from several insurance brokers and the Northern California broker for Lloyd's of London.

In May, 1957, affiant's efforts for insurance protection became noticeably unsuccessful, at which time United Warranty Company liquidated.

Thereafter, during the month of May, 1957, affiant contacted Francis B. Ryan, one of the defendants herein for the purpose of obtaining employment as a salesman, and thereafter affiant worked as a salesman for said Francis B. Ryan. At the time of obtaining said employment, affiant was advised by said Francis B. Ryan that the National Bonded Cars,

Inc., warranties were insured by an insurance company. Having the necessary insurance backing, affiant was able to sign agreements with upwards of fifty (50) new car dealers in Mr. Ryan's territory, between May, 1957, and November, 1957.

In November, 1957, affiant learned, by way of the Attorney General of the State of California, that National Bonded Cars, Inc., did not comply with the regulations of the Insurance Commission of the State of California, and immediately thereafter affiant resigned his employment with said Francis B. Ryan.

After such resignation, affiant had been employed as a wholesale and retail automobile salesman, until the end of April, 1958. Thereafter, since the month of May, 1958, affiant is and has been engaged in the business of selling insurance for Central Agency, one of the defendants herein.

Since his resignation as a salesman for said Francis B. Ryan, affiant has never been engaged in selling mechanical automobile warranties, such as those sold or issued by or on behalf of the plaintiff; that neither said Francis B. Ryan, nor anyone on his behalf or on behalf of the plaintiff, has at any time imparted to said affiant any trade secrets of said plaintiff, and that said affiant has never entered into any agreement, written or oral, with the plaintiff or anyone on its behalf, of any kind or character whatsoever, whereby he obligated himself to refrain from engaging in any legal occupation.

Affiant further states that he at no time conspired with any of the defendants, or any other persons, to deprive plaintiff of any of its business or property through illegal means.

/s/ DONALD BROOKS.

Subscribed and sworn to before me this 29th day of September, 1958.

[Seal] /s/ JEAN M. PHILLIPS,
Notary Public in and for the County of Marin,
State of California.

My commission expires 9-14-60.

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF FRANCIS B. RYAN, ON BEHALF OF DEFENDANTS FRANCIS B. RYAN, DONALD BROOKS, TRUMAN RENZ, AND NADIA, IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

State of California,
City and County of San Francisco—ss.

Francis B. Ryan, being first duly sworn, deposes and says:

That he presently resides in the State of California; that prior to December, 1955, he resided in the State of New Jersey, and that on the 12th day of

December, 1955, he entered into a License and Franchise Agreement, a copy of which is attached to the complaint on file herein and designated as Exhibit A.

That at the time of entering into such agreement, plaintiff herein represented to affiant that the said plaintiff was the owner of certain ideas, forms, plans, system and knowledge for engaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of an independent Warranty thereof. That pursuant to the terms of said agreement plaintiff herein agreed to furnish affiant with its ideas, forms, plans, system and knowledge for the making of automobile inspections and the issuance of warranties for the purchases of approved new or used cars within the territory described.

That the term of said agreement was for a period of one (1) year, commencing on the 12th day of December, 1955, with provision that the said agreement should be automatically renewed thereafter from year to year, unless affiant should give written notice to the plaintiff of his desire to terminate the agreement not later than sixty (60) days prior to the end of the then current term.

Said agreement further provided that the affiant agrees to comply in all respects with all laws, statutes and regulations, Federal, State, County and Municipal, and all other Governmental authorities that may be necessary for or incidental to the conduct of the business.

That thereafter, on or about February 7, 1957, C. Wesley Milburn, Treasurer of the plaintiff corporation, telephoned to the affiant and stated that it would be necessary for all District Managers to sign a new form of agreement, which is in all respects the same as the existing agreement, except that the title should be changed to read "Area Franchise Agreement," in lieu of "License and Franchise Agreement," and that on or about the 7th day of February, 1957, said C. Wesley Milburn, copy of which is attached hereto, marked Exhibit A, and made a part hereof, enclosing two executed copies of new Agreement, and stating that the same was required by New York law, and requesting that the new Agreement be executed so that the plaintiff should not be in difficulties in California, because of an interpretation by the Insurance Commission.

That affiant had been acting pursuant to and under the terms of the Agreement dated December 12, 1955, and had at all times complied with all the terms and conditions thereof within his power so to do. That the plaintiff, by its action as aforesaid, with reference to the execution of the Agreement dated February 7, 1957, attached to the complaint on file herein and marked Exhibit A, perpetrated fraud on the affiant in inducing the affiant to execute the same by stating that it was a mere matter of form rather than substance that was being changed, while in truth and in fact plaintiff omitted the representation as to the performance of such warranties being insured under a master policy

with the Employers Liability Insurance Corporation, Ltd., or any insurance company. That affiant relied upon the promises so made by the plaintiff and would not have executed said Agreement if it had not been for such false and fraudulent representations so made by the plaintiff to the affiant. That by reason of said fraud affiant was damaged in large sums of money, the exact amount of which is unknown to him at this time.

That the Agreement dated February 7, 1957, likewise provided that the affiant shall comply in all respects with all the laws, statutes and regulations, Federal, State, County and Municipal and all other Governmental authorities that may be necessary for or incidental to the conduct of the business of such area representative. That based upon plaintiff's representations, affiant was acting under the impression that plaintiff had complied with the laws and regulations of the State of California, as the same may be affected in any manner by any insurance laws of said State, and that warranties issued were insured under a master policy with the Employers Liability Insurance Corporation, Ltd.

That plaintiff herein had never furnished the affiant with any of the ideas, forms, plans, system and knowledge, for engaging in the business of the inspection of all major mechanical parts of new or used cars and the issuance of an independent Warranty thereof, as provided for in said Agreements, and have never imparted any trade or business secrets of any kind to the affiant.

That under the opinion of the Attorney General of the State of California, dated November 21, 1957, under number 57/148, the activities of said plaintiff and said defendants in the State of California were deemed in violation of the insurance laws of the State of California, and therefore said agreements were rendered impossible of performance.

It is the affiant's position that the Agreements hereinabove referred to were in violation of the laws of the State of California and contrary to public policy, in that the activities required of the affiant had for its purpose the undertaking to indemnify purchases of automobiles against loss, damage or liability, arising from a contingent or unknown event resulting from mechanical failures of automobiles without insurance coverage as represented to the affiant by the plaintiff.

Even assuming, without prejudice, that said Agreement of December 12, 1955, was legal, plaintiff has breached the same in many particulars, among others, failure to furnish affiant with ideas, forms, plans, system and knowledge for engaging in the business of the inspection of all major mechanical parts of used or new cars and the issuance of independent Warranty thereof, and providing insurance for such warranties.

That the Agreement of February 7, 1957, was induced through fraud and misrepresentation and likewise was in violation of the laws of the State of California, and therefore was impossible of performance.

This affiant further states that in addition to the ruling of the Attorney General of the State of California, as aforesaid, it became impossible for this affiant to conduct business on a profitable basis because of circularization among auto dealers, warning against mechanical condition guaranties by the Better Business Bureau of Los Angeles, under date of June 19, 1957, and the circularization by the Better Business Bureau of San Francisco, under date of December 2, 1957, and a Memorandum to Automobile Dealers, stating that Warranty Companies, dealing in used cars are under Insurance Commission, as well as Motor Car Dealers Association circular on May 20, 1958, pointing out to its membership that the California Insurance Commission had taken exception to the practices or policies of certain used car warranty groups, claiming that these operations should be under the jurisdiction of the Insurance Department. That because of the warnings above stated, and plaintiff's failure to furnish insurance coverage, affiant's business came to a virtual standstill, and the agreements were impossible of further performance, even if determined to be legal.

That affiant, defendants Brooks and Rentz, are not now or ever since the filing of said action, and for some time prior thereto, have not been engaged in the business of selling mechanical automobile warranties, such as those issued by the plaintiff, and that defendant NADIA is not nor, or ever has been, engaged in the business of selling mechanical auto-

mobile warranties such as those issued by the plaintiff.

That on or about the 18th day of August, affiant delivered to plaintiff, all books, records, files, and accounts on employees relating to his business with the plaintiff and is not now acting or purporting to act as plaintiff's area representative in the territory referred to in said Agreement.

That affiant at no time caused any transfer of plaintiff's accounts to defendant NADIA or any other person or organization.

That affiant denies that he had entered into any conspiracy with any other defendants, or any other persons, to deprive plaintiff of any of its property or business, as alleged in said complaint, or at all.

/s/ FRANCIS B. RYAN.

Subscribed and sworn to before me this 29th day of September, 1958.

[Seal] /s/ JEAN M. PHILLIPS,
Notary Public in and for the County of Marin, State
of California.

My commission expires 9/14/60.

EXHIBIT A

National Bonded Cars, Inc.
Executive Offices: 120 Morris Avenue
Springfield, N. J.
DRexel 6-4900

C. Wesley Milburn, Treasurer

February 7, 1957.

Mr. Frank B. Ryan,
National Bonded Cars of Northern California,
2446 Van Ness Ave.,
San Francisco, California.

Dear Frank:

We are enclosing herewith two executed copies of the new agreement which is required by New York law between National Bonded Cars, Inc., and its District Managers.

Will you kindly execute both, return one to us, together with your old franchise, so that we will not be in difficulties in California because of an interpretation by the Insurance Commission.

It is very important that we have these in our office as soon as possible so please return your old franchise and a signed copy of the new by Air Mail.

Cordially yours,

NATIONAL BONDED CARS,
INC.,

/s/ WESS,

C. WESLEY MILBURN,
Treasurer.

Sent 2/12/57.

CWM:bk

Encls.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN P. DEVANEY

State of California,
County of Los Angeles—ss.

John P. Devaney, being duly sworn, deposes and says:

That he is the Executive Vice-President of Balboa Insurance Company, a defendant in the above-entitled action. That he makes this affidavit in opposition to plaintiff's motion for a preliminary injunction.

Hereinafter in this affidavit various defendants shall be referred to by the same names they are referred to in the Complaint.

Balboa is an insurance company doing business in the State of California under and by virtue of

the laws of said State and pursuant to a license issued by the Insurance Commissioner thereof.

Your affiant states that on June 7, 1958, Balboa entered into an agency agreement with Central for the issuance of mechanical warranties. This agreement was executed after your affiant and other management executives of Balboa exercised their underwriting judgment as to the premium rate, the extent of coverage, and other matters related to mechanical warranty policies. In the exercise of that judgment your affiant considered the loss ratio experience of several companies including Resolute Insurance Company, Employers' Liability Insurance Corporation, and Continental Casualty Insurance Company.

This information was furnished Balboa not only by Robertson, as Balboa's producing agent, but by agents or employees of the above-named insurance companies as well. In this connection affiant is informed that Ryan did not have and could not furnish complete or reliable loss ratios of plaintiff or other information of value and that it was necessary for Robertson in formulating an underwriting proposal to Balboa to secure information from other insurers engaged in writing this type of coverage.

Your affiant states that Central is and has been Balboa's producing agent since 1953 and that its duties as such are expressly set forth under the terms of a written contract. One of the duties of Central as Balboa's agent is the compiling of statisti-

cal information including loss experience, premium rates and policy coverages pertaining to the issuance of policies by Balboa. Said information is commonly available from the various companies engaged in the writing of the different classes of insurance, assureds whose losses are covered by the policies, other agents or producers engaged in producing the same type of insurance, and in various public records including national publications specializing in insurance matters. These and similar duties are customarily performed in the insurance business by all insurance producers, both brokers and agents, and it is from such information that insurance companies are able to establish rates which are not excessive, inadequate, nor unfairly discriminatory.

As a licensed insurer, Balboa is governed by the laws of the State of California as contained in the Insurance Code. Section 1852 of said Code provides that an insurer's rates shall not be excessive, inadequate, or unfairly discriminatory and that in the making of rates "consideration shall be given to the extent applicable, to past and prospective loss experience within and outside this State, to conflagration and catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to past and prospective expenses both country-wide and those specially applicable to this State, and to all other factors, including judgment factors, deemed relevant within and outside this State." Section 1853 of said Code provides: "Subject to and in compliance with the provisions of this chapter authoriz-

ing insurers to be members or subscribers of rating or advisory organizations or to engage in joint underwriting or joint reinsurance, two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the making of rates or rating systems, the preparation or making of insurance policy or bond forms, underwriting rules, surveys, inspections and investigations, the furnishing of loss or expense statistics or other information and data, or carrying on of research."

In one of the provisions in the contract between Balboa and Central, Central was authorized to enter into subagency contracts with other licensed insurance agents. Under the terms of said contract, and as is common and customary in the insurance business, Central had authority to appoint its subagents without the approval or control of Balboa. This appointment is accomplished by the filing by Central with the Insurance Commissioner of the State of California a written record of the appointment.

The verified affidavit of Geoffrey K. Clowes in support of plaintiff's motion for a preliminary injunction, on page 3, lines 13 to 15, states that a Donald B. Lynch "on behalf of Ryan and Hacking approached other insurance companies including Balboa * * *" Your affiant states that neither he nor any other employee of Balboa ever heard of, or spoke to, any person known as Donald B. Lynch,

nor has he had any negotiations with any such person at any time.

Mr. Clowes states on page 3, paragraph 6, of his affidavit that in negotiations with Ryan and Hacking your affiant directly requested a "detailed and exhaustive examination of all of Ryan and Hacking's records in the operation of plaintiff's business in both Northern and Southern California" and that plaintiff's loss ratio experience, "highly confidential information," was given by Ryan and Hacking. Your affiant states that no such request was made by him at any time. Your affiant further states that the loss ratio experience of insurance companies, writing this and comparable types of insurance, is a matter of public record, published semi-annually in national circulation trade-magazines such as Insurance Spectator, Best's Insurance Guide, National Reporter, Western Underwriter, Insurance Investor, and others.

In November, 1957, the Attorney General of California issued an opinion at the request of the Insurance Commissioner holding that mechanical warranties of the type described in plaintiff's Complaint were insurance policies and that any company issuing them must be licensed as an insurance carrier in the State of California. As a direct result of this opinion of the Attorney General, and because plaintiff was not a licensed insurance carrier, the Insurance Commissioner of the State of California on December 23, 1957 issued a letter directed to

plaintiff herein, ordering said plaintiff to cease and desist from engaging in the issuance or sale of said mechanical warranties.

Neither your affiant nor other employees of Balboa had prior knowledge of any appointment of NADIA and NAMIA as Central's subagents. Neither affiant nor any other employees of Balboa now have, nor ever have had, any knowledge of the ownership of defendants NADIA and NAMIA and does not have any information of the terms or conditions of its agreements or relationships, if any, with either Ryan, Hacking, Renz, Brooks, Chambers, and the plaintiff.

Affiant specifically denies that he, Balboa, or any of Balboa's employees ever engaged in or had knowledge of any conversation, arrangement, agreement, or conspiracy to destroy the business of plaintiff and to divert plaintiff's accounts and customers to itself or any other organization, nor to induce Ryan and Hacking or any other employees or agents of plaintiff to breach or terminate any arrangements or contracts existing between them.

Except as otherwise expressly set forth in this affidavit, affiant denies each and every statement pertaining to conduct by affiant and Balboa set forth in the affidavit of Geoffrey K. Clowes on file with this Court.

/s/ JOHN P. DEVANEY.

Subscribed and sworn to before me this 30th day of September, 1958.

[Seal] /s/ EDMUND W. COOKE,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires May 7, 1960.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 2, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF E. N. HACKER

State of California,
City and County of San Francisco—ss.

E. N. Hacker, being first duly sworn, deposes and says:

That I am an automobile dealer doing business under the name of Hacker Motor Company, with offices at 2345 Broadway, Oakland, California.

I have been associated with the Balboa Insurance Company for many years, and when I heard they were offering mechanical insurance for their various dealers I requested they explain the mechanical insurance to me. I dealt with the Balboa Insurance Company on many occasions through the Central Agency.

Upon learning that Balboa offered a legitimate insurance coverage to my customers, I began selling Balboa mechanical insurance to them.

Prior to this time I was offering my customers a used car mechanical warranty issued by National Bonded Cars, Inc. I selected the Balboa Insurance Company instead of the services offered by National Bonded Cars, Inc., for the following reasons:

1. It was less expensive than National Bonded Cars.
2. It appeared to comply with an opinion of the Attorney General of the State of California which had come to my attention.
3. I felt it my prerogative to select a company in which I had complete confidence.

/s/ E. N. HACKER.

Subscribed and sworn to before me this 27th day of September, 1958.

[Seal] /s/ WALTER E. ALLEE,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires July 23, 1962.

[Endorsed]: Filed October 6, 1958.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Plaintiff has asked for a preliminary injunction enjoining the defendants from soliciting plaintiff's former franchised automobile dealers to enter into agreements providing for the inspection of their automobiles and issuance of warranties or certificates of insurance covering the mechanical parts of said automobiles by any one other than plaintiff, and from using trade secrets of the plaintiff in such business. Plaintiff, a New Jersey corporation, is engaged in the business of inspecting used cars for automobile dealers, and issuing through said dealers to the purchasers of automobiles so inspected and approved warranties protecting them against the cost of repairs or replacement of the automobile parts specifically listed in said warranties. In essence, the plaintiff asserts that the defendants, through defendants Ryan and Hacking, former employees of plaintiff, have obtained the trade secrets of its business, and the customer lists of plaintiff in California, and that the defendants are using this information and these trade secrets unfairly. On the basis of this complaint the plaintiff has sought a preliminary injunction upon the ground that irreparable injury will be caused if the defendants are not required to cease and desist from the use of the information illegally obtained, and from soliciting plaintiff's customers upon the basis of that information.

The record shows that there is now pending in the Superior Court of the State of California, in and for the City and County of San Francisco, an action for declaratory relief and for an injunction by the plaintiff against F. Britton McConnell, as Insurance Commissioner of the State of California, asking the State court to declare that the Insurance Commissioner has no jurisdiction to require plaintiff to qualify as an insurer, or to procure a certificate of authority in order to engage in business, and adjudging and declaring that plaintiff's business is not insurance as defined by the Insurance Code of California, and in the alternative plaintiff asks for an injunction to restrain the Commissioner from enforcing a cease and desist order issued by him on December 23, 1957. The cease and desist order was issued by the Insurance Commissioner pursuant to an opinion of the Attorney General of the State of California, which was issued November 21, 1957 (30 Ops. Cal. Atty. Gen. 253) to the general effect that plaintiff was engaged in the insurance business, and was required to qualify under the Insurance Code of the State of California as an insurer. On January 28, 1958, the State court issued a preliminary injunction enjoining the Commissioner from enforcing his cease and desist order, and from interfering with plaintiff in carrying on its business in the State of California.

The federal action was commenced on September 4, 1958, and the parties have stipulated that the action in the State court is now pending in the status

of having a preliminary injunction in full force and effect, and is awaiting further proceedings.

Defendants have challenged the right of the plaintiff to a preliminary injunction in this action upon the ground that there is a doubtful question of law involved in the State court action, in that the right of the plaintiff to do business in California is now the subject of litigation in the courts of the State of California, and that all of the injuries which plaintiff claims must necessarily flow from its right to do business in this State, and further, that until the right of the plaintiff to do business in California is determined by the State courts, this Court should not use its extraordinary injunctive power.

Defendants' contention is based on the broad equitable principle that a preliminary injunction will not issue where the right which complainant seeks to have protected is in doubt. See 43 C.J.S. Injunctions, § 19, pp. 431, 434. See also 27 Cal. Jur. 2d, Injunctions, § 48.

This general rule is recognized in various federal jurisdictions. See: *Sneider vs. Transcontinental & Western Air, Inc.*, 79 F. Supp. 339, 341 (D. C. Del. 1948); *American Radiator & Stand. San. Corp. vs. Sunbeam Corp.*, 125 F. Supp. 839, 841 (D. C. S. D., N. Y. 1954); and *Alaska Sales and Service vs. Rutledge*, 128 F. Supp. 1, 3 (D. C. Alaska 1955). These and numerous other cases stand for the basic proposition that where there is a doubtful question of law or fact a preliminary injunction will not be granted.

Plaintiff recognizes this rule, but contends that it is not applicable to this case because the preliminary injunction heretofore issued by the State court gives it the right to do business in California at the time the issue on the injunction in this Court is being considered, and that in any event the issue of the right to do business under the provisions of the Insurance Code of the State of California is immaterial to the granting of a preliminary injunction in the Federal Court action. In any event the plaintiff contends that this question should not be determined as a matter of law, but that additional evidence should be taken, so that the Court can balance the equities between the parties to determine the importance of the question of the necessity to secure a license from the State of California.

The Court concludes that as a matter of law upon the present state of the record the application for preliminary injunction should be denied. The whole business relationship which plaintiff seeks to protect by preliminary injunction is dependent upon its right to do business in California. The trade secrets, the confidential information and the customer lists which plaintiff seeks to protect can only be used in connection with this business relationship in California, and the defendants' alleged unlawful appropriation of those business rights is involved with doing business only in California. Therefore, plaintiff can be harmed if at all, only if it has the right to do business in California. This very right is the subject of the undetermined action pending in the State court. Based upon the undisputed record be-

fore this Court, it is apparent that plaintiff's right to a preliminary injunction rests upon a disputed question of law. In that situation this Court should not exercise its discretion in favor of the preliminary injunction.

It is, therefore, Ordered that plaintiff's application for a preliminary injunction be, and the same is hereby denied. Counsel for defendants are directed to prepare and present findings, conclusions and an order in accordance herewith.

Dated: October 7, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed October 7, 1958.

[Title of District Court and Cause.]

**PROPOSED MODIFICATIONS OF FINDINGS
OF FACT AND CONCLUSIONS OF LAW**

Plaintiff proposes the following modifications of the findings of fact and conclusions of law filed by the defendants in the above action:

Findings of Fact

1. Page 3, line 1 of defendants' findings of fact should be modified to read as follows:

"the business of inspecting all major mechanical parts of automobiles and issuing warranties in connection therewith to the purchasers of automobiles,"

Reasons for Modification: Paragraph 2 of plaintiff's verified complaint alleges that plaintiff's business consists of inspecting automobiles as well as issuing warranties thereon. This allegation was not denied by any of the defendants. Judge Carter's Memorandum and Order, dated October 7, 1958 (page 1, second sentence), is to the same effect.

2. The first complete sentence on page 3 of said findings (lines 3 to 7) should be deleted.

Reasons for Modification: Judge Carter's afore-said Memorandum and Order did not include such a finding and nothing in the record supports it.

3. Page 3, lines 16 and 17 of said findings, should be modified to read as follows:

"issue its warranties in the State of California and adjudging and ordering that the issuance of said warranties by plaintiff is not insurance as defined by the Insurance Code of"

and page 3, lines 24 to 26 of said findings, should be modified to read as follows:

"(Gen. 253), to the general effect that organizations like plaintiff issuing warranties in the State of California are transacting insurance business and are required to qualify as insurers under the Insurance Code of the State of California."

Reasons for Modifications: The only evidence in the record as to the nature of the state court proceeding is the Attorney General's Opinion (30 Ops., Cal. Atty. Gen. 253), the Insurance Commissioner's

“cease and desist” order of December 23, 1957, and plaintiff’s complaint against the Insurance Commissioner for declaratory relief and an injunction. Defendants’ findings, referred to above, misconceive the effect of said evidence. A reading of the aforesaid documents makes it apparent that the only aspect of plaintiff’s business which the Attorney General held was the transaction of insurance and with respect to which the Insurance Commissioner issued his “cease and desist” order was the issuance by plaintiff of its warranties. The findings should reflect this fact specifically rather than indicate, as defendants’ findings purport to do, that plaintiff’s general right to do business in California is in issue in the state court proceeding.

4. Page 4, line 1, of said findings should be modified to read as follows:

“the right of the plaintiff to issue its warranties in California without qualifying as an insurer”

Reasons for Modification: Nothing in the record indicates that there is any dispute, subject to litigation in the state courts or otherwise, as to the plaintiff’s right to do business in California. The Attorney General’s Opinion, the Insurance Commissioner’s “cease and desist” order, and the plaintiff’s complaint in the Superior Court Action (No. 475485) clearly show that the only question which is subject to litigation in the state court is whether or not plaintiff has the right to issue its warranties in California without qualifying as an insurer. As

indicated previously, plaintiff's business has heretofore consisted of inspecting automobiles as well as issuing warranties thereon. Plaintiff's right to inspect automobiles in California has never been, and undoubtedly cannot be, questioned. Likewise, plaintiff's right to utilize its inspection expertise and other confidential information in furnishing the same service to California residents as has heretofore been furnished by it, but without the issuance of its warranties, is not subject to litigation in the state court.

5. The language beginning with the word "and" on page 4, line 3 and ending with the word "California" on page 4, line 7 of said findings should be deleted.

Reasons for Modification: This language is based on the erroneous finding (described in item 4 above) that plaintiff's right to do business in California is the subject of litigation in the state court. If the true finding were submitted for the erroneous one, then, said language should be deleted as having no foundation in the record or in reason. Said substitution would change said language to read as follows:

"and that all of the injuries which plaintiff claims, and the property rights claimed by plaintiff consisting of certain alleged trade and confidential secrets and customers' lists are dependent upon plaintiff's right to [issue its warranties in the State of California without qualifying as an insured.]"

At the hearing on plaintiff's motion for a preliminary injunction plaintiff offered to prove that the property rights sought to be protected by it were not dependent upon its right to issue its warranties in California. The Court refused to hear evidence on this subject, thus keeping out of the record the only possible basis for the above finding.

Conclusions of Law

6. The conclusions of law (page 4, lines 8 to 17) are meaningless in that they are based on the erroneous finding that the disputed question of law in the state court proceeding is whether or not plaintiff has the right to do business in California. As heretofore stated, that is not the question before the state court. It is submitted that the actual question of law before the state court, to wit, whether or not plaintiff has the right to issue its warranties in California without qualifying as an insurer, is not at all material in the instant action.

Respectfully submitted,

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 20, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

Plaintiff filed a complaint against the above-named defendants and on the basis of said complaint and an affidavit of Geoffrey K. Clowes, and on the ground that irreparable injuries will be caused if the defendants are not required to cease and desist from the use of the information alleged to be illegally obtained and from soliciting plaintiff's customers upon the basis of that information, made a motion for preliminary injunction enjoining the defendants from soliciting plaintiff's former franchise automobile dealers to enter into agreements providing for the inspection of their automobiles and issuance of warranties on a certificate of insurance covering the mechanical parts of said automobiles by any one other than plaintiff and using trade secrets of plaintiff in such business.

Defendants Francis B. Ryan, Donald Brooks, and Nation-Wide Automobile Dealers Insurance Agency, as well as defendants Jack L. Robertson, The Central Agency of San Francisco, Incorporated, and Balboa Insurance Company, filed their respective affidavits and Memorandums of Points and Authorities in opposition to said motion.

Said defendants severally and jointly challenged

plaintiff's right to such preliminary injunction on several grounds but, particularly, they challenged the right of the plaintiff to a preliminary injunction in this action upon the ground that there is a doubtful question of law in the State of Court action in that the right of the plaintiff to do business in California is now the subject of litigation in the Courts of the State of California, and that all of the injuries which plaintiff claims must necessarily flow from its right to do business in the State and further that until the right of the plaintiff to do business in California is determined by the State Courts, this Court should not use its extraordinary injunctive power.

This cause came on regularly for hearing before the Court, Philip S. Ehrlich, Feldman & O'Donnell, Jesse Feldman and Murry J. Waldman, by Jesse Feldman and Murry J. Waldman, appearing as counsel for the plaintiff and Wallace, Garrison, Norton & Ray, by Maynard Garrison, Esq., appearing for defendant Balboa Insurance Company, and A. Brooks Berlin and Alvin A. Lobree, appearing as counsel for defendants Jack L. Robertson and The Ceneral Agency of San Francisco, Incorporated, and Vladimir Vucinich, Esq., appearing for defendants Francis B. Ryan, Donald Brooks, and Nation-Wide Automobile Dealers Insurance Agency, and the Court having examined the proofs offered by the respective parties, hearing the arguments of counsel and being fully advised in the premises, the following findings of facts and conclusions of law

constituting the decision of the Court in said action are hereby made:

1. That plaintiff, a New Jersey corporation, is engaged in the business of issuing warranties to the purchasers of automobiles, protecting them against the cost of repairs or the replacement of the automobile parts specifically listed in said warranties. The business is conducted through (area representatives), who, as a matter of practice, inspect used cars, for automobile dealers and cause plaintiff's warranties to be issued through such dealers to the purchasers of automobiles so inspected.

2. That the record shows that there is now pending in the Superior Court of the State of California, in and for the City and County of San Francisco, an action, No. 475485, for declaratory relief and for an injunction by the plaintiff against F. Britton McConnell, as Insurance Commissioner of the State of California, asking the State Court to declare that the Insurance Commissioner has no jurisdiction to require plaintiff to qualify as an insurer, or to procure a certificate of authority in order to engage in business and adjudging and declaring that plaintiff's business is not insurance as defined by the Insurance Code of California, and in the alternative plaintiff asks for an injunction to restrain the Commissioner from enforcing a cease and desist order issued by him on September 23, 1957. The record further shows that the cease and desist order was issued by the Insurance Commissioner pursuant to

an opinion of the Attorney General of the State of California issued November 21, 1957 (30 Ops. Cal. Atty. Gen. 253), to the general effect that plaintiff was engaged in the insurance business and was required to qualify under the Insurance Code of the State of California as an insurer.

3. That on January 28, 1958, the Superior Court of the State of California, in said action, issued a preliminary injunction, enjoining the Insurance Commissioner from enforcing the said cease and desist order and from interfering with plaintiff and carrying on of its business in the State of California during the pendency of said action, or until the Court shall otherwise order.

4. The right of the plaintiff to do business in California is now the subject of litigation in the Courts of the State of California and that all of the injuries which plaintiff claims, and the property rights claimed by plaintiff consisting of certain alleged trade and confidential secrets and customer's lists, are dependent upon plaintiff's right to do business in the State of California.

Conclusions of Law

Based upon the undisputed record before the Court, it is apparent that plaintiff's right to preliminary injunction rests upon a disputed question of law, and that until the right of the plaintiff to do business in California is determined by the State Courts, this Court should not use its extraordinary

injunctive power, based on the equitable principle that a preliminary injunction will not issue where the right which plaintiff seeks to have protected is in doubt.

Let the Order be entered accordingly.

Dated this 13th day of October, 1958.

/s/ OLIVER J. CARTER,
Judge of the District Court.

[Stamped]: Oct. 31, 1958.

Disapproved October 13, 1958.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

Lodged October 15, 1958.

United States District Court for the Northern
District of California, Southern Division

Civil Action No. 37635

NATIONAL BONDED CARS, INC.,

Plaintiff,

vs.

FRANCIS B. RYAN, DONALD BROOKS, A.
E. HACKING, JAMES CHAMBERS, TRU-
MAN RENZ, JACK L. ROBERTSON, DON-
ALD B. LYNCH, NATIONAL BONDED
CARS OF SOUTHERN CALIFORNIA,
INC., BALBOA INSURANCE COMPANY,
THE CENTRAL AGENCY OF SAN FRAN-
CISCO, INCORPORATED, NATION-WIDE
AUTOMOBILE DEALERS INSURANCE
AGENCY, and NATION-WIDE AUTOMO-
BILE MECHANICAL INSURANCE AGEN-
CY, INC.,

Defendants.

ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION

This cause came on regularly for hearing on the 6th and 7th days of October, 1958, before the above-entitled Court, Philip S. Ehrlich, Feldman & O'Donnell, Jesse Feldman and Murry J. Waldman, by Jesse Feldman and Murry J. Waldman, appearing as counsel for the plaintiff, and Wallace, Garrison, Norton & Ray, by Maynard Garrison, Esq., appearing for defendant, Balboa Insurance Com-

pany, and A. Brooks Berlin and Alvin A. Lobree, appearing as counsel for defendants, Jack L. Robertson and The Central Agency of San Francisco, Incorporated, and Vladimir Vucinich, Esq., appearing for defendants, Francis B. Ryan, Donald Brooks, and Nation-Wide Automobile Dealers Insurance Agency, and the Court having examined the proofs offered by the respective parties and having heard the arguments of respective counsel and being fully advised in the premises, and findings of fact and conclusions of law having been submitted and approved,

It Is Therefore Ordered that plaintiff's application for preliminary injunction herein be and the same is hereby denied.

Done in Open Court This 31st day of October, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

Approved as to form October 15, 1958.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Plaintiff.

Lodged October 15, 1958.

[Endorsed]: Filed October 31, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that National Bonded Cars, Inc., Plaintiff-Appellant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order denying plaintiff's motion for a preliminary injunction entered in this action on October 31, 1958.

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Appellant, Na-
tional Bonded Cars, Inc.

[Endorsed]: Filed November 21, 1958.

[Title of District Court and Cause.]

STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

1. The Findings of Fact and Conclusions of Law adopted by the District Court in denying Plaintiff's motion for a preliminary injunction are erroneous and not supported by the evidence.

2. The District Court erred in refusing to give any effect to the preliminary injunction obtained by the Plaintiff in the proceeding in the Superior Court of California in and for the City and County of San Francisco entitled National Bonded Cars, Inc., v. F. Britton McConnell, as Insurance Commissioner of the State of California.

3. The District Court erred in refusing to permit the Plaintiff to introduce oral testimony at the hearing on its motion for a preliminary injunction.

Dated: November 20, 1958.

Respectfully submitted,

PHILIP S. EHRLICH,
FELDMAN & O'DONNELL,
JESSE FELDMAN,
MURRY J. WALDMAN,

By /s/ MURRY J. WALDMAN,
Attorneys for Appellant Na-
tional Bonded Cars, Inc.

[Endorsed]: Filed November 24, 1958.

Office of the Attorney General
State of California
Edmund G. Brown
Attorney General

No. 57/148

November 21, 1957

OPINION OF EDMUND G. BROWN, ATTOR-
NEY GENERAL; HAROLD B. HAAS,
DEPUTY ATTORNEY GENERAL

The Honorable F. Britton McConnell, Insurance Commissioner of the State of California, has requested the opinion of this office whether business concerns, other than vendors of automobiles issuing in this State contracts which purport to guarantee (or "warrant") against failure within one year of specified parts of the running gear of used cars, are transacting insurance business.

Our conclusion may be summarized as follows:

Such organizations in the business of issuing such guarantees (or "warranties") are transacting insurance business in this State.

Analysis

The following is the statement of the problem by the commissioner:

"Several organizations have been formed in various states, including California, which issue so-

called 'warranties' or 'guarantees' for the benefit of automobile dealers and their purchasers. These so-called warranties or guarantees are sold in California by such organizations to automobile dealers who use them here as an inducement for the purchase of an automobile and either give or sell them to the automobile purchaser in connection with such purchase.

"The so-called 'warranties' or 'guarantees' fall into four general types:

"Type (1): A percentage discount from the cost of parts and repair service is provided the automobile owner for a specific period by the warranty organization, provided the repair work is done by the issuing dealer, or by an 'authorized warranty dealer,' or in other words one who participates in the use of these warranties. No inspection or test of parts is a condition of the warrantor's obligation. In the event the dealer making the repairs refuses to honor the warranty document and grant a discount, the warranty organization will pay the proper cash refund to the warranty holder through the issuing dealer. (See Exhibits I A (1), (2), (3), (4).)

"Type (2): The warrantor organization purports to inspect and test the automobile, prior to sale of the warranty to the car dealer. The warranty provides that the warrantor organization will bear the auto purchaser's cost of repair and replacement of designated parts in the event of failure thereof during a specified period. As a condition to payment

of such repair and replacement cost, the automobile purchaser must first obtain authorization from the warrantor organization to have the repair and replacement work done by the garage or mechanic selected by the automobile purchaser. (See Exhibits II A (1); III A (1), (2); IV A (1), (2); V A (1); VI A (1).)

“Type (3): The warrantor organization purports to inspect and test the automobile prior to sale of the warranty to the car dealer. The warranty guarantees that if inspected parts fail to give a minimum of one year’s service under normal usage and wear, the warrantor organization itself will repair or replace such parts, including labor, without charge. The warranty stipulates that all repairs and replacements shall be performed or directed by an authorized representative of the warrantor organization. (See Exhibit VII A (1), (2).)

“Type (4): The warrantor, or guarantor organization issuing the Guarantee, or Warranty promises to bear the automobile purchaser’s cost of replacement and repair of designated parts within a specified period. The Guarantee or Warranty does not recite or rest on any inspection by the warranty organization, but contains a certification by the guarantor or warrantor organization that the car dealer has inspected and tested the automobile. (See Exhibits VIII A (1), (2), (3).)”

Further details are furnished by the request for opinion but need not be stated here. Such organiza-

tions known to be operating in this State, or their attorneys, have been notified of the request and furnished a copy. The commissioner has also supplied us with copies of the relevant documents relating to several of these. The attorneys for two of these organizations have furnished helpful memoranda of law.

The picture drawn by the facts thus set forth and the relevant documents furnished is one more demonstration that modern business and industrial developments have often been accompanied by corresponding changes in financial risks which in turn have required changes in economic and social devices to minimize that risk.

The primary such device so far developed has been insurance.¹ Thus there has been a tremendous increase in the scope and volume of property insurance business and coverage in the twentieth century, from the initial field of coverage of ships and buildings against physical damage or destruction, to a network of risk-shifting contracts directed to the contingent loss potential of almost every commercial activity.

Another such device has been the seller's warranty as part of a sale of a chattel. The old common law rule that the buyer assumes the total of

¹Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." (Ins. Code, Sec. 22.)

the risks which are part of acquiring ownership is today subject to many exceptions, of both legislative and judicial creation, based upon contract theories of implied and express warranty and upon fraud theories. A similar concept of implied and express warranty extends to rendition of certain services, again under both a contract theory and a tort theory.² And, in turn, the contract to render services itself has been used, at least partially, as a risk-shifting device in response to the social needs thus created or realized.³

Because of the great difference of the regulatory and tax law applicable to insurance as contrasted with that law applying to warranties and service contracts, courts and lawyers have repeatedly faced the problem of classification between these categories as changes in risk-shifting devices have developed. This request for opinion calls for such a classification.

The first problem is one of simplification. It is obvious here that the problem cannot be met by treating each contract, whether labelled "warranty" or otherwise, as an isolated transaction. The conduct of the business of issuing such contracts in mass

²Gagne v. Bertran, 43 Cal. 2d 481, 275 P. 2d 15; Crawford v. Duncan, 61 Cal. App. 647, 215 Pac. 573.

³California Physicians' Service v. Garrison, 28 Cal. 2d 790; 172 P. 2d 4; Transportation Guar. Co. v. Jellins, 29 Cal. 2d 242, 174 P. 2d 625.

is brought into question, not merely whether the particular contract by its terms is insurance.⁴

Likewise, we must consider the contention that certain of the contracts are service or maintenance contracts and not insurance. Contracts which were construed as agreements to furnish services as and when needed have in some cases been held to be contracts for service, not insurance contracts, despite the contingency element. On this point our Supreme Court said:

“Absence or presence of assumption of risk or peril is not the sole test to be applied in determining its [the contract] status. The question, more broadly, is whether, looking at the plan of operation as a whole, ‘service’ rather than ‘indemnity’ is its principal object and purpose” (Cal. Physicians’ Service v. Garrison, 28 Cal. 2d 790, 809, 172 P. 2d 4; cf. Transportation Guar. Co. v. Jellins, 29 Cal. 2d 242, 174 P. 2d 625).

However, we see no substantial element of the service contract in the contracts here involved. It is true that most provide for inspection prior to issuance of the contract and limit liability of the

⁴Consequently, such cases as *James Eva Estate v. Oakland B. & M. Co.*, 40 Cal. App. 515, 181 Pac. 415, upholding the validity of a surety bond subscribed by a brewing corporation to protect a landlord, and *Garratt v. Baker*, 5 Cal. 2d 745, 56 P. 2d 225, upholding a single contract by members of a co-partnership to pay an annuity to the widow of the first partner to die, have no relevance to this problem.

contract-issuing organization to vehicles thus inspected and accepted, whether by the automobile dealer or by such organization, but the inspection is at most a condition precedent. No subsequent servicing is contemplated as to a car which passes inspection and on which a so-called "warranty" has been issued, except by way of "protection" from the expense of purchasing and installing, or repairing, a part of the running gear which has, after the "warranty" contract was issued, failed to function. This is not "service"; it is "indemnity."

Furthermore, the idea that the contracts are sold as, or represented to be, "service" is just a bit beyond the practicalities. This is the case whether the transactions be viewed as contracts with the dealer for the benefit of the car purchasers or directly with the purchasers.

The maintenance of, or availability of, mechanic forces and tools, is, of course, essential to any dealer's business. He has no occasion to purchase inspections of his cars from one of these organizations, except for the indemnity aspect in connection with his sale of the car.

The car buyer, likewise, desires and buys in contemplation of avoiding loss from failure of the running gear to function. So far as he is concerned, if he can get this, with or without inspection, it is what he wants. Basically, the inspection, if any, is for the protection of the contract-issuing organization, to enable it to refuse to "warrant" or guaran-

tee the running gear of the car; that is, the inspection is a part of the "selection" or "underwriting" function, analogous to a life insurer's, steam boiler insurer's, or fire insurer's inspection of certain or all "risks."

Most emphatically, however, the concerns engaged in this car-"warranty" business contend that they are merely making warranties, not insuring. In brief, they argue that their contracts merely provide that they inspect the cars and warrant the efficiency of the inspection. This, they claim, is not the conduct of an insurance business. Examination of the basic elements of the fields of "insurance" and "warranty," however, does not, we think, support this contention.

It is true that the law of warranty is not confined to the sale of tangible chattels:

"Strict liability has also been imposed for innocent misrepresentations of facts that the maker purported to know, that the recipient relied on in matters affecting his economic interests, and that the maker positively affirmed under circumstances that justify the conclusion that he assumed responsibility for their accuracy" (*Gagne v. Bertran*, 43 Cal. 2d 481, 486; 275 P. 2d 15).

In California law such liability as to service contracts is illustrated by *Crawford v. Duncan*, 61 Cal. App. 647, 215 Pac. 573. There a physician was held liable for breach of an express warranty that he would treat swollen glands on plaintiff's neck with

radium without leaving any permanent scar. Such permanent healing did not take place. The action was brought after the running of the one-year statute of limitations on actions for injury to the person. On appeal from a nonsuit order based on that statute of limitations, the court said:

“This is not an action of tort. That is, it is not an action for malpractice based on negligence. It is an action for breach of an alleged oral agreement whereby defendant warranted that his radium treatments would not leave a permanent scar. It is subdivision 1 of section 339 of the Code of Civil Procedure, therefore, and not subdivision 3 of section 340 of that code, which is applicable; and the statute of limitations did not run until the expiration of two years from the time when plaintiff’s cause of action accrued” (61 Cal. App. 647, 650).

On the other hand, the distinction between such liability and the common-law obligation that services to be performed under a contract will be performed with due care and without negligence is illustrated by *Gagne v. Bertran*, *supra*. In that case, defendant had been hired to test drill a building site. The purpose of the test drilling was to determine whether there was “fill” present, in view of a city ordinance which required the depth of foundation of the building to be erected to be 18 inches below the natural ground surface. Defendant made the test drillings negligently, reporting no fill below 16 inches. The first foundation digging developed areas with 3 to 6 feet of fill, substantially increas-

ing the cost of the foundations. Action was brought by a complaint stating alternative theories of recovery: (1) breach of warranty, (2) deceit, and (3) negligence. Held, the counts on deceit and negligence were good, but not the count on breach of warranty:

“The evidence in the present case does not justify the imposition of the strict liability of a warranty. There was no express warranty agreement, and there is nothing in the evidence to indicate that defendant assumed responsibility for the accuracy of his statements. He did not, as did the defendant in *Crawford v. Duncan* [supra] * * *, tender plaintiffs an ‘absolute promise’ that the result of his test would be accurate. He was not a seller of property who obligated himself as part of his bargain to convey property in the condition represented. The amount of his fee and the fact that he was paid by the hour also indicate that he was selling service and not insurance. Thus the general rule is applicable that those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or personal misconduct” (43 Cal. 2d 481, 487; 275 P. 2d 15; emphasis supplied).

We would not interpret this case as necessarily holding that any promissory warranty which expressly assumes the risk of loss in consequence of the failure of a service to achieve the promised results takes the promisor into the field of insurance. For instance, the learned writer of the Gagne opin-

ion therein points to several warranties, implied by common law, or imposed by statute, which cannot conceivably have this effect (see 43 Cal. 2d 481, at pp. 486-487, ftn. 1, 2). But these statements do emphasize the principle that neither the purported form of the contract nor the fact that a "warranty" or "guarantee" may be involved is decisive of the question of whether the business of issuance of the contracts is, or is not, insurance. It is particularly significant, we think, that the court, in passing on whether or not the "strict liability" of a warranty should be imposed in connection with a contract to render service, referred by implication to the test laid down by it in *California Physicians' Service*, *supra*, and restated in *Transportation Guar. Co.*, *supra*, for determining whether a transaction was service on the one hand or insurance on the other:

"The question, more broadly, is whether, looking at the plan of operation as a whole, 'service' rather than 'indemnity' is its principal object and purpose" (28 Cal. 2d at 790).

Nor was this reference in the *Gagne* case to the "service" vs. "insurance" test a mere chance expression. First used in the opinion as the criterion for determining that the "strict liability" of a warranty was not justified on the facts in the record, the opinion repeats the test in holding that the facts did support a cause of action for negligence:

"The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their

profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance” (43 Cal. 2d 481, 489).

It is of interest that an earlier California case foreshadows essentially the same test. In *Title Ins. & Trust Co. v. Los Angeles*, 61 Cal. App. 232, 234, 214 Pac. 667 (Supr. Ct. hrg. den.), it was held that the issuance of contracts providing that “after a careful examination of the official records of the county of Los Angeles, state of California, and of the records of the federal offices located at Los Angeles, in relation to the title of that certain real property hereinafter described, the Company, a corporation, having its principal place of business in the city and county of Los Angeles, state of California, hereby guarantees that the title to said property as it appears from said records, is vested in” was insurance business.

The court referred to *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. 545, in which defendants had furnished a certificate stating that after examining the title records “we find the same vested in Jacob Birnbaum free from all incumbrances” (emphasis by the court, 61 Cal. App. 232, 236). That *Lattin* case, holding the certificate not to be insurance, was distinguished on the ground that:

“There was not, as there is in the present case, a contract guaranteeing that the record and its legal

effect were as stated in the certificate. In the Lattin case there was merely the contract implied in the acceptance of the employment, that the records would be carefully examined, and that the defendants would in good faith state their opinion concerning the effect of the records. They would be liable for negligent or other failure to perform that contract. The right of action would accrue at once upon issuance of the certificate, and it would be an action to recover damages for breach of contract. But in the case of a certificate like that now before us, the party entitled to the benefit of the guaranty has a right of action to recover upon the contract contained in the certificate itself, and the liability is one that does not accrue until discovery of the loss that may be incurred if the title is not as represented in the certificate'' (61 Cal. App. 232, 236).

Our attention has been called to cases from other jurisdictions which, it is contended, apply in principle to this question, holding that various contracts are not insurance contracts.⁵ To discuss these in

⁵*People v. May*, 162 App. Div. 215, 147 N.Y.S. 487, aff'd 212 N.Y. 561, 106 N.E. 1039 (financial report service assumed liability for accuracy of report at time of investigation; excluded subsequent changes of financial condition or the results thereof);

State v. Standard Oil Co., 138 Ohio St. 376, 35 N.E. 2d 437 (tire vendor guaranteed against failure from faulty construction or material, expressly excluding various damages from external causes such as punctures, fires, etc.);

Cole v. Haven (Ia.) 7 N.W. 383 (lightning rod dealer, upon sale of lightning rod, agreed to pay

detail would be of little value and would also require discussion of a number of cases which seem to be contra.⁶ Examination develops only differences which seem to arise out of local statutes and decisions.

all lightning damages resulting to building upon which rod was installed, within given time after installation);

Evans & Tate v. Premier Refining Co., 31 Ga. App. 303, 120 S.E. 553 (vendor of gear lubricant "insured" purchasers from vendee against breakage of gears by natural wear and tear);

See also: Moresh v. O'Regan, 120 N.J. Eq. 534, 187 Atl. 619; reversed on other grounds, 122 N.J. Eq. 388, 194 Atl. 156 (contract to care for and replace plate glass on breakage; court disapproved *Peo. v. Stand. Plate Glass & Salvage Co.*, n. 2, *infra*).

⁶State v. Western Auto Supply Co., 134 Ohio St. 163, 16 N.E. 2d 256, 119 A.L.R. 1236 (tire vendor warranted tire against damage from various or all causes, not limited to defects of material or workmanship);

Physicians' Defense Co. v. Cooper, 199 Fed. 576 (organization agreed to defend physician in case he was sued for malpractice during certain future period);

Ollendorff Watch Co. v. Pink, 279 N.Y. 32, 17 N.E. 2d 676 (watch vendor agreed to replace watch if stolen within one year from purchase, reciting in certificate that same was based on insurance policy maintained in force by vendor);

See also: *People v. Standard Plate Glass & Salvage Co.*, 174 App. Div. 501, 156 N.Y.S. 1012 (defendant's contract proposed to care for and putty plate glass in its frame and replace it if broken; court said the puttying provision was in the nature of an inspection and was really for the protection of defendant).

It is worth noting, however, that a number of Attorneys General have advised their various State Insurance Departments on this subject. Those holding that the agreements or business are not insurance seem to do so on the assumption that the inspection by the contract-issuing firm can and will be such that there is but remote possibility of a flaw in the running gear escaping detection by inspection and that consequently the firm has in effect the same control over the product, the inspected automobile, as a manufacturer who warrants tangible goods against defects of material or workmanship.⁷ The contra opinions seem to be based, on the whole, upon the principle that the basic purpose of the transactions is the creation of an indemnity contract for sales purposes.⁸ It seems to us that the latter are more realistic and tend to parallel the "service-or-indemnity" alternative repeatedly enunciated by our own Supreme Court.

It is therefore our opinion that the transactions described by the commissioner constitute transaction of an insurance business.

⁷N.Y., Jan. 9, 1957, Weekly Underwriter I.D.S. 1957, N.Y. 5;

Alabama, April 19, 1957;

Florida, Sept. 14, 1956, Weekly Underwriter I.D.S. 1956, Fla. 87; this assumption, we feel, cannot be made here; such information as we have is to the contrary.

⁸Nevada, No. 298, Aug. 20, 1957, Weekly Underwriter I.D.S. 1957, Nev. 4;

Kentucky, Aug. 28, 1957, Weekly Underwriter I.D.S. 1957, Ky. 24.

While the general public policy involved does not here influence our views one way or the other, it seems but reasonable to call attention to the facts. Several of these concerns are presently in operation in California. Many of these contracts have already been issued in this State. There are no present practical means other than insurance regulatory laws whereby the public can be protected from failure of any of these contract-issuing organizations to maintain means of meeting these obligations to the public. On the one hand, at least one of the organizations operating on a national scale has for some time prudently and properly maintained an insurance policy in force for the purpose of indemnifying its losses under its "warranty" contracts. This alone is ample demonstration that the business so developed can successfully qualify under the insurance regulatory laws without fatally handicapping its development. But on the other hand, another company doing this type of business in this State has failed, leaving warranty holders remediless.

The foregoing are our views on the basic question. We now proceed to answer the specific questions asked:

"1. Do any, or all, of the documents designated variously as 'warranties' or 'guarantees' constitute an insurance contract within the meaning of California Insurance Code Section 22?"

Our answer is in the affirmative.

“2. Does either the issuance or sale of such documents considered in the light of the facts herein set forth and the provisions of Insurance Code Section 700, constitute the transaction of insurance which would require the application for and the obtaining of a Certificate of Authority from the Insurance Commissioner?”

Our answer is in the affirmative.

“3. If your answer to either Questions No. 1 or No. 2 is in the affirmative, what classes of insurance as defined in Section 100 of the California Insurance Code are involved?”

This might depend somewhat on the circumstances and form (see sec. 121, Ins. Code). However, it would appear that these contracts all deal with a hazard arising out of “ownership” or “use” of an automobile and consequently fall in class 16, “Automobile insurance” (sec. 116, Ins. Code).

“4. Would the answer to any of the preceding questions be different if it were determined:

“(a) That no inspection of the vehicle parts specified in the documents is made by any one;

“(b) That such inspection was made by the motor vehicle dealer but was not made by the organization issuing the warranty;

“(c) That the inspection was made by an independent contractor who was neither an employee of the dealer nor an employee of the organization issuing the document;

“(d) That the only inspection of the vehicle was made by the manufacturer thereof and that no inspection was made by any other person, firm or organization;

“(e) That the inspection is actually made by the guarantor corporation although the guarantee by its terms purports to rest upon an inspection by the automobile dealer?”

Our answer is in the negative.

“5. We do not answer the fifth question since we do not believe that the fact of inspection is determinative in the cases specified.

“6. Would your answer to any of above questions be different if the following language was added to the provisions of the warranty or guarantee:

“ ‘It shall be presumed that in the case of failure of the parts listed in this warranty, and subject to the provisions herein, that the same resulted from defects in material or workmanship.’ ”

Our answer is in the negative.

“7. Would your answer to any of the above questions be different if the warranties or guaranties were limited in their application to new cars as distinguished from used cars; or if applicable to used cars were limited to cars manufactured within the five-year period immediately preceding issuance of the warranty?”

Our answer is in the negative.

“8. Would your answer to any of the preceding questions be different if the automobile purchaser was not charged for the warranty or guarantee by the auto dealer?”

Our answer is in the negative.

“9. Does the existence of a policy of insurance of an insurer (admitted or nonadmitted), promising to indemnify the organization for losses sustained under the warranties, affect any of your answers to the foregoing questions?”

Our answer is in the negative.

Superior Court of the State of California, in and
for the City and County of San Francisco

No. 475485

NATIONAL BONDED CARS, INC., a Corpora-
tion,

Plaintiff,

vs.

F. BRITTON McCONNELL, as Insurance Com-
missioner of the State of California,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF
AND FOR AN INJUNCTION

Comes Now the above-named plaintiff and for
cause of action against the above-named defendant
complains and alleges as follows:

I.

Plaintiff is a corporation organized under the laws of the State of New Jersey and licensed to do business therein and is doing and has been doing an interstate business in the State of California. It conducts the business of inspecting new or used vehicles, for franchised automobile dealers only, throughout the United States. Its inspection and examination, limited to those parts of an automobile where inspection can determine, with accuracy, whether or not repairs or replacements of those parts will be required during the ensuing year under normal usage, is the basis of the certification and warranty issued by it on each car which meets its rigid inspection and specifications.

The parts certified and warranted after inspection by plaintiff are specifically listed in the warranty. The warranty clearly states that it does not protect the purchaser of the automobile for repairs or replacements not specifically listed, nor for adjustments, and that it does not cover repairs necessary because of collision, negligence, or misuse or major alterations not recommended by the manufacturer.

II.

That plaintiff had been engaged in said business in the State of New Jersey, since March 26, 1954, and thereafter in about 40 other states of the Union.

III.

That the defendant, F. Britton McConnell, is the duly appointed, qualified and acting Insurance Com-

missioner of the State of California, and is the head of the Department of Insurance of said State.

IV.

That plaintiff has heretofore franchised a great number of automobile dealers in the State of California under an agreement entitled Dealer's Franchise, copy of which is attached hereto, made a part hereof, and for reference is marked plaintiff's Exhibit "A."

V.

That by said franchise and agreement plaintiff agrees and has agreed with said dealers that it will inspect any automobiles owned by and in possession of the dealer at the place of business therein set forth and will thereupon furnish such automobile dealer a detailed report on the mechanical condition of the major parts thereof and in those instances where such report indicates that the mechanical condition of the automobile so inspected is sound and in good working order, and it is approved as per form prescribed by such dealer's franchise agreement, then plaintiff will issue its written warranty covering such specified parts of the automobile. That the warranty issued to dealers pursuant to such inspection of the mechanical condition of automobiles owned by such dealer is attached hereto and made a part hereof and for reference is marked plaintiff's Exhibit "B"; that the form of inspection report attached to and made a part of said warranty, showing the parts of the automobile warranted by plaintiff, is attached hereto and made a

part hereof and for reference is marked plaintiff's Exhibit "C."

VI.

That for some time prior to the year 1957 plaintiff conducted its business throughout the United States and particularly in the State of California unimpeded by any threat of regulation or jurisdiction of said state regulatory body or agency; that on or about said date the defendant questioned the right of plaintiff to transact business in the State of California, defendant contending that the said business constituted insurance. That on or about July 10, 1957, plaintiff was informed and advised that the defendant intended to and would submit to the Attorney General of California a request for an opinion whether the automobile warranty or guaranty constituted the transaction of insurance, and on or about August 5, 1957, said request was actually submitted. That on November 21, 1957, the Attorney General rendered Opinion No. 57/148, holding that "such organizations in the business of issuing such guaranties (or 'warranties') are transacting insurance in this state."

VII.

That since the rendition of said opinion and the receipt thereof by the defendant, the defendant has notified plaintiff that in order to engage in its business of issuing its warranty or guaranty certificates to purchasers of automobiles in this state it must qualify as an insurance company and procure from the California Insurance Commissioner a certificate

of authority to transact insurance, and request is therein made that on or before January 15, 1958, the defendant be furnished a written statement specifying what actions have been taken to assure prompt discontinuance of the alleged illegal activity of plaintiff in the conduct of its business in this state. Said notification is dated December 23, 1957, and a copy thereof is attached hereto, made a part hereof and marked plaintiff's Exhibit "D."

VIII.

That in many states where plaintiff now transacts said business of inspecting and warranting specified parts of the mechanical condition of automobiles, such transaction of business has been ruled upon by the Attorneys General thereof as being valid and not violative of any insurance laws of such states; that the Attorney General of the State of New York, the Honorable Jacob K. Javits (now United States Senator from the State of New York) rendered an opinion to the Superintendent of Insurance of New York, Honorable Laffert Holz, on January 9, 1957, holding that these same warranty contracts issued by plaintiff were not insurance contracts; that on April 19, 1957, the Attorney General of Alabama rendered an opinion to the Superintendent of the Department of Insurance of that state holding that such contracts were not insurance; that some time after June 29, 1956, the Attorney General of Florida advised the Insurance Commissioner of that state that said warranty agreement or certificate of plaintiff was not insur-

ance; that the attorney for the Commissioner of Insurance of the State of Virginia on October 14, 1955, advised that said warranty agreement was not insurance; that the General Counsel for the Insurance Department of the Commonwealth of Pennsylvania on September 14, 1956, advised that said warranty was not insurance; that the Chief Rate Analyst of the State of Massachusetts advised the Superintendent of the Forms Department of that state that said warranty was not insurance.

IX.

In the opinion of the Attorney General of California rendered to the defendant it is stated:

“While the general public policy involved does not here influence our views one way or the other, it seems but reasonable to call attention to the facts. Several of these concerns are presently in operation in California. Many of these contracts have already been issued in this State. There are no present practical means other than insurance regulatory laws whereby the public can be protected from failure of any of these contract-issuing organizations to maintain means of meeting these obligations to the public. On the one hand, at least one of the organizations operating on a national scale has for some time prudently and properly maintained an insurance policy in force for the purpose of indemnifying its losses under its ‘warranty’ contracts. This alone is ample demonstration that the business so developed can successfully qualify under

the insurance regulatory laws without fatally handicapping its development. But on the other hand, another company doing this type of business in this State has failed, leaving warranty holders remediless." (Underscoring added.)

X.

That in consequence of said opinion of the Attorney General of this state and the action taken by the defendant pursuant thereto evidenced by Exhibit "D" plaintiff is threatened with disruption of its substantial business conducted in this state with a great many automobile dealers and purchasers of automobiles therefrom who are and have been furnished said warranty agreement.

That a controversy therefore exists between plaintiff and defendant whether the contracts plaintiff issues are in fact insurance.

XI.

That defendant will, unless restrained pending the determination of the question whether or not such contracts are in fact insurance within the meaning and definition thereof as contained in Section 22 of the Insurance Code of California, take such action as is authorized by said Insurance Code to prosecute, enjoin plaintiff, or seize such business as may be located in this state, which such action will cause irreparable damage to plaintiff and cause great loss to plaintiff and to its customers.

XII.

That plaintiff has no plain, speedy and adequate remedy at law and it and its agents, servants and employees are threatened with oppressive prosecution under the penal provisions of said Insurance Code of California; that the terms, requirements and demands of defendant's said order of "cease and desist" issued and delivered to plaintiff as set forth in Exhibit "O" attached hereto are oppressive, unlawful, confiscatory and deprive plaintiff of property without due process of law and violate the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 13 (clause sixth) of the Constitution of the State of California.

XIII.

That the defendant herein proposes to, threatens to and will, unless restrained by the Court, cause plaintiff, its agents, servants and employees to be prosecuted for violation of provisions of the Insurance Code of California, none of which are applicable to the type and character of the lawful business carried on by plaintiff, and will otherwise harass and oppress plaintiff, its agents, servants and employees unless restrained by this Court.

XIV.

That defendant also has mentioned orally still another more drastic procedure which he proposes and threatens to use against plaintiff unless plaintiff immediately ceases and desists from engaging in its

lawful business in this state as described in paragraph I hereof, and that procedure so threatened is seizure of plaintiff's assets and property in this state under and pursuant to the provisions of Sections 1011, et seq., of the California Insurance Code; that such drastic procedure would cause great and irreparable injury and damage to plaintiff.

Wherefore, plaintiff prays:

1. For a Declaratory Judgment, adjudging and declaring that said defendant, as Insurance Commissioner of the State of California, and as head of the Department of Insurance of said State, has no jurisdiction or authority to require or compel plaintiff to qualify as an insurer or to procure a Certificate of Authority from him in order to engage in said business described in paragraph I of the Complaint herein, and adjudging and declaring that plaintiff's said business is not insurance as defined by the Insurance Code of California.

2. That an alternative injunction be issued pending the hearing of this action directing and commanding said defendant, as Insurance Commissioner of the State of California, his agents and employees of his department, to refrain from enforcing said order to "cease and desist" dated December 23, 1957, and attached hereto as plaintiff's Exhibit "D," and from causing the arrest of said plaintiff's agents, servants and employees and from taking the more drastic action and procedure of seizure of plaintiff's property, business and assets

located in this State, and from otherwise interfering with plaintiff, its agents, servants and employees in the carrying on of said described business and that upon the final hearing of this action, said injunction be made permanent.

3. For such other and further relief in the premises as justice may require.

NEIL CUNNINGHAM,
CRIDER, TILSON & RUPPE,

By JOE CRIDER, JR.,
Attorneys for Plaintiff.

Duly verified.

EXHIBIT A

Originators of the 1 Year Warranty Plan for New Car Dealers

Dealer's Franchise

National Bonded Cars, Inc., agrees that it will for the duration of this agreement inspect any automobiles not older than 5 model years including the current model owned by and in the possession of the Dealer at its place of business hereinafter set forth, and will issue a warranty of the mechanical condition of each such car approved by it.

Dealer agrees to submit cars owned by it and offered or to be offered for sale, that in its opinion

will meet National Bonded Cars, Inc., inspection requirements during the existence of this agreement.

The total charge made by National Bonded Cars, Inc., to Dealer for its inspection, the issuance of a warranty thereon to the Dealer and the authorized delivery of such warranty by Dealer to purchaser of such car is \$42.50 payable as follows:

Dealer agrees to pay National Bonded Cars, Inc., the sum of Fifteen (\$15.00) Dollars per car at the time of completion of inspection and the issuance of a warranty. Upon each bona fide sale of such approved car, Dealer is authorized to deliver the warranty left with it covering such car on inspection and approval, to the purchaser thereof, and to send immediately the form attached thereto properly filled out to the local District Office of National Bonded Cars, Inc., together with payment of the balance of Twenty-seven Dollars and Fifty Cents (\$27.50) then due to National Bonded Cars, Inc., whereupon the warranty of National Bonded Cars, Inc., will be in full force and effect.

After the initial inspection of Dealer's cars, National Bonded Cars, Inc., agrees to arrange a schedule of periodic inspections for cars subsequently acquired by Dealer. Dealer agrees to use its best efforts to co-operate with and aid the inspector of National Bonded Cars, Inc., during each such inspection visit.

On any claims arising and covered by the warranty of National Bonded Cars, Inc., it will inspect and authorize the necessary repairs. Upon satis-

factory completion of such authorized repairs immediate payment will be made.

This agreement shall remain in full force and effect from the date hereof unless written notice of the desire of either party to terminate the same shall be sent to the other at its address as herein stated at any time, which notice shall effect such termination forthwith.

In Witness Whereof, Dealer, of, Address, has duly executed this franchise agreement, which upon due execution thereof by National Bonded Cars, Inc., at its home office in the State of New Jersey shall be and become a binding franchise agreement between said Dealer and National Bonded Cars, Inc., as of the date herein set forth.

Dated, 195...

NATIONAL BONDED CARS,
INC.,
120 Morris Ave., Spring-
field, N. J.,

By,
President.

Dealership by, Signature,
Title

General Information

Make of Car Sold.....
New Car Sales Per Year (Approx.).....

Used Car Sales Per eYar (Approx.).....
 Number of Salesmen Employed by Dealer.....
 Retail Labor Rate Per Hour.....

.....,
 (Signature of District
 Representative.)

EXHIBITS B & C

National Bonded Cars, Inc.
 120 Morris Avenue
 Springfield, N. J.

Warranty 311 No. 07993

Valid Anywhere in the United States of America

National Bonded Cars, Inc., certifies that it has inspected the vehicle below described and certifies that in its opinion the parts hereinafter specified are in good working order and condition and will with normal usage require no repairs or replacements for one (1) year from the date of purchase. National Bonded Cars, Inc., agrees that if its said certification is in error, it will protect the retail purchaser of this vehicle and holder of this Warranty from any costs of repairs which may arise for one year from date of purchase on the following specific parts subject to the terms and conditions hereinafter set forth to the extent of the total reasonable price for repairs, replacement and labor

which become necessary in the normal use of the below motor car:

Motor: Pistons, pins and rings, valves, valve lifters, valve stems, valve guides, valve springs, oil pump and timing gears. Camshaft, Crankshaft, Bearings and gaskets.

Standard Transmission: Gears, seals and bearings within housing.

Automatic Transmission: Gears, seals and bearings within housing and electrical mechanism in transmission.

Rear Axle: Gears, bearings, oil seals and gaskets within housing.

Clutch: Disc. Pressure plate. Release bearings.

Steering: Front axle assembly (except alignment and adjustments). Power steering.

Brakes: Master brake cylinder. Wheel cylinders. Power brakes.

(Seals and gaskets to be replaced only with other repairs.)

This Warranty is for the exclusive use of the dealer to whom issued and of the retail owner named herein and is not transferrable.

This Warranty is restricted to passenger cars which are not operated for commercial use.

This Warranty is in full force for one year from the date of purchase noted hereon provided only, however, that a written confirmation from National

Bonded Cars, Inc., of protection hereunder is received by the holder of this Warranty within twenty (20) days from date of purchase.

The necessity for repairs or replacement under this Warranty shall remain in the sole discretion and judgment of National Bonded Cars, Inc. Written authorization must first be obtained before any repairs are made.

The holder of this Warranty is not protected for repairs or replacements not specifically listed in this Warranty for adjustments or tune-ups, for repairs arising out of or revealed by collision or upset, regardless of the contention that the specific failure was not caused by the collision or upset, nor for any repairs caused by neglect, misuse or resulting from major alterations by Warranty holder not recommended by manufacturer.

This Warranty does not cover repairs or replacements necessitated by loss or damage resulting from fire, water, windstorm, hail, lightning, or earthquake, nor during the period when such car has been stolen and is out of the control of the owner named below.

National Bonded Cars, Inc., assumes no liability under this Warranty for delays or failure hereunder caused by acts of God, government, labor difficulties or causes beyond its control or for damages resulting from delays in performing the services under this Warranty or for any consequential damages whatsoever.

The terms and conditions of this Warranty cannot be modified or extended except by an express agreement in writing between the Warranty holder and National Bonded Cars, Inc.

Notify National Bonded Cars, Inc., immediately if you do not receive required written confirmation from it or protection hereunder within twenty days from date of purchase.

Notice of any needed repairs or replacements covered by this Warranty must be given immediately to National Bonded Cars, Inc.

This Warranty Protects.....
Issued by
Owner of Year Make
Serial No..... Body Type..... Date of
Purchase

[Coupon]

311 No. 07993

Year Make..... Serial No.....
Body Type..... Date of Purchase.....

Home Office Use Only

Year, Make, Ser. No., Effective Date, N or U
Car, Dealer No., Spdmtr. Rdg., Inspectors No., CA
Code.

Dealership..... City.....

Signature.....

Purchaser's Name (Print or Type).....

Street Address (Print or Type).....

City (Print or Type).....

Purchaser's Signature

Dealer's Stock Number.....

Home Office Copy. .

10/10/57—Form 101-1

National Bonded Cars, Inc.

Instructions

1. This is your Warranty. It is a valuable document. Read it carefully, then place it in your Car's Glove Compartment. When your Confirmation Card arrives attach it to this Warranty and keep both in your car.

2. If you have a mechanical failure, check your Warranty to see if the failure is listed.

3. If you are in your local area, call the National Bonded Cars, Inc., District Office.

4. If you are out of State, ask Information for the local N.B.C. Office. If one is not available phone, wire, or write National Bonded Cars, Inc., 120 Morris Avenue, Springfield, N. J. (DRexel 6-4900).

5. Important! Authorization Must First Be Obtained Before Any Repairs Are Made * * * Have Your Warranty Symbol and Number Available When You Call, and Be Sure They Appear on All Correspondence Sent to National Bonded Cars, Inc.

National Bonded Cars Has District Offices in Most Major Cities in the United States.

The use of the Maintenance Guide is urged for proper operation of your car while under warranty by National Bonded Cars, Inc.

Maintenance Guide

Lubricate Chassis: 1,000 Miles.

Change Engine Oil: 2,000 Miles. (Type and grade oils as recommended by car manufacturer. Not multiviscosity oil.)

Change Oil Filter Cartridge: 4,000 Miles.

Engine Tune-up: 5,000 Miles.

Check Brake Master Cylinder Fluid Level: 5,000 Miles.

Adjust Brakes: 5,000 Miles.

Cross-Switch Tires: 5,000 Miles.

Clean and Repack Front Wheel Bearings: 10,000 Miles.

Change Transmission (Standard or Overdrive) Lubricant: 10,000 miles.

Adjust Automatic Bands and Change Fluid: 15,000 Miles.

Repack Universal Joints: 20,000 Miles.

For Proper Servicing of Your Car May We Suggest You Return to Your Selling Dealer.

“Drive Safely”

“The Life You Save May Be Your Own”

EXHIBIT D

F. Britton McConnell
Insurance Commissioner

Goodwin J. Knight
Governor

State of California
Department of Insurance
1182 Market Street
San Francisco 2

December 23, 1957.

National Bonded Cars, Inc.,
c/o Joe Crider, Jr., Esq.,
Crider, Tilson & Ruppe, Attorneys-at-Law,
548 South Spring Street,
Los Angeles 13, California.

Subject: California Attorney General's
Opinion (No. 57/148), Dated November 21, 1957. Re: Automobile Warranties.

Gentlemen:

A copy of the subject Opinion wherein it is stated that organizations in the business of issuing guarantees (or "warranties") described in the Opinion are transacting insurance business in California has been previously mailed to you by the Attorney General.

In order to engage in such insurance business in this state, it is mandatory that a Certificate of Authority be procured from the California Insurance Commissioner. It is our duty and intention to fully enforce the law.

Request is hereby made that on or before January 15, 1958, this office be furnished a written statement by an executive officer, and your attorney if you wish, specifying what actions have been taken to assure prompt discontinuance of such illegal activity in this state.

Very truly yours,

F. BRITTON McCONNELL,
Insurance Commissioner;

By /s/ MERVIN R. SAMUEL,
Chief, Compliance and Legal
Division.

MRS:dk

[Endorsed]: Filed October 7, 1958.

In the Superior Court of the State of California, in
and for the City and County of San Francisco

No. 475485

NATIONAL BONDED CARS, INC., a Corpora-
tion,

Plaintiff,

vs.

F. BRITTON McCONNELL, as Insurance Com-
missioner of the State of California,

Defendant.

F. BRITTON McCONNELL, Insurance Commis-
sioner of the State of California,

Cross-Complainant,

vs.

NATIONAL BONDED CARS, INC., a Corpora-
tion; SUN INSURANCE OFFICE, LTD., a
Corporation, and AMERICAN EMPLOYERS
INSURANCE CO., a Corporation,

Cross-Defendants.

CROSS-COMPLAINT FOR INJUNCTION

Now comes defendant in the above-entitled action
and cross-complains against National Bonded Cars,
Inc., a corporation; Sun Insurance Office, Ltd., a
corporation, and American Employers Insurance
Co., a corporation, as follows:

I.

Refers to, realleges and incorporates herein as though here set forth in full, paragraphs I, II, III, IV, V, VI and VII of defendant's answer to the complaint in this action; that a copy of said answer is attached hereto.

II.

That cross-defendants Sun Insurance Office, Ltd., and American Employers Insurance Co. are foreign Corporations, duly licensed to transact insurance business in the State of California.

III.

That cross-defendant and plaintiff, National Bonded Cars, Inc., is engaged in transacting insurance business in the State of California as alleged in paragraph I of defendant's answer which is incorporated in this cross-complaint by paragraph I hereof.

IV.

That cross-defendants Sun Insurance Office, Ltd., and American Employers Insurance Co. have participated, aided, and abetted, and now continue to participate, aid and abet, in such transaction of insurance in this State by plaintiff and cross-defendant National Bonded Cars, Inc., by insuring payment of the liability of National Bonded Cars, Inc., under the contracts embodied in the documents issued by National Bonded Cars, Inc., referred to in subparagraphs (b) through (f) of paragraph I of defendant's answer to the complaint in this action, which is incorporated herein by paragraph I of this cross-complaint.

Wherefore, defendant and cross-complaint prays judgment:

1. For a permanent injunction, enjoining and restraining plaintiff and cross-defendant, National Bonded Cars, Inc.:

(a) From engaging in the business of issuing its purported "auto warranty" agreements or any substantially similar documents for consideration in this State without first procuring a certificate of authority from the Insurance Commissioner permitting it so to act, and

(b) From soliciting, negotiating or otherwise arranging with automobile dealers for such issuance unless so licensed.

2. For such injunction restraining cross-defendants Sun Insurance Office, Ltd., and American Employers Insurance Co. from in any manner insuring or otherwise aiding or abetting plaintiff and cross-defendant National Bonded Cars, Inc., in such business unless and until said National Bonded Cars, Inc., is so licensed; and

3. For defendant and cross-complainant's costs herein and for such other relief as to this Court seems proper.

Dated: March 21, 1958.

EDMUND G. BROWN,
Attorney General;

HAROLD B. HAAS,
Deputy Attorney General, Attorneys for Defendant
and Cross-Complainant.

PLAINTIFF'S EXHIBIT No. 2

Superior Court of the State of California for the
City and County of San Francisco

No. 475485

NATIONAL BONDED CARS, INC., a Corpora-
tion,

Plaintiff,

vs.

F. BRITTON McCONNELL, as Insurance Com-
missioner of the State of California,

Defendant.

PRELIMINARY INJUNCTION

The above-entitled matter having regularly come on for hearing in Department 21 on the 23rd day of January, 1958, pursuant to an order to show cause why a preliminary injunction should not issue and plaintiff appearing by its counsel, Neil Cunningham and Crider, Tilson & Ruppe, by Joe Crider, Jr., and defendant appearing by his counsel, Edmund G. Brown, Attorney General of the State of California, by Harold B. Haas, Deputy Attorney General of the State of California, and the court being fully advised in the premises, and good cause appearing therefor,

It Is Ordered that during the pendency of this action, or until the court shall otherwise order, the defendant, and his agents, servants, employees and

representatives, shall be and hereby are enjoined and restrained from engaging in or performing, directly or indirectly, any and all of the following acts:

(a) Enforcing the order to plaintiff to cease and desist its business in the State of California as set forth in the complaint on file herein and from causing the arrest of said plaintiff's agents, servants and employees from taking action to seize plaintiff's property, business and assets located in the State of California, or

(b) Interfering with plaintiff, its agents, servants and employees in the carrying on of its business in the State of California as described in the complaint on file herein.

It Is Further Ordered that the preliminary injunction as hereinabove set forth shall issue upon plaintiff's filing an undertaking in the sum of \$5,000.00 in due form as required by law.

Dated this 28th day of January, 1958.

MILTON D. SAPIRO,

Judge of the Superior Court.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 7, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by counsel for the Appellant, Except the Affidavit of A. E. Hacking and the Designation by Appellees are not included for the reason such pleadings do not appear among the records in this office:

Excerpt from Docket Entries.

Complaint.

Notice and Motion for Preliminary Injunction.

Affidavit of Geoffrey K. Clowes in Support of Preliminary Injunction.

Answer of Donald D. Lynch.

Answer and Counterclaim of A. E. Hacking.

Affidavit of C. J. Schnabel.

Affidavit of L. C. Fox.

Affidavit of George Kuhn.

Affidavit of Verne F. Garrett.

Counter Affidavit of Jack L. Robertson and Central Agency.

Affidavit of Donald Brooks.

Affidavit of Francis B. Ryan on behalf of defendants Ryan, Brooks, Renz and Nadia.

Affidavit of John P. Devaney.

Affidavit of E. N. Hacker.

Memorandum of Court Denying Application for Preliminary Injunction.

Proposed Modifications to Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law.

Order Denying Preliminary Injunction.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

The following copies of pleadings in Case No. 475,485 in the Superior Court of the State of California, in and for the City and County of San Francisco.

Complaint (Plaintiff's Exhibit 1 in the U. S. District Court Case 37635-Civil).

Cross-Complaint for Injunction.

Preliminary Injunction (Plaintiff's Exhibit 2 in U. S. District Court).

Opinion of Edmund G. Brown, Attorney General of the State of California, No. 57/148, November 21, 1957.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of December, 1958.

C. W. CALBREATH,
Clerk;

[Seal] By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 16293. United States Court of Appeals for the Ninth Circuit. National Bonded Cars, Inc., Appellant, vs. Francis B. Ryan, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: December 8, 1958.

Docketed December 18, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 16295 ✓

United States
Court of Appeals
for the Ninth Circuit

TODD SHIPYARDS CORPORATION,

Appellant.

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

MAY - 5 1959

PAUL P. O'BRIEN, CLERK

No. 16295

United States
Court of Appeals
for the Ninth Circuit

TODD SHIPYARDS CORPORATION,
Appellant.
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

McCUTCHEN, DOYLE, BROWN & ENERSEN,
RUSSELL A. MACKEY,
BRYANT K. ZIMMERMAN,

1400 Balfour Bldg.,
351 California St.,
San Francisco 4, California;

CROWELL, ROUSE & VARIAN,
111 Broadway,
New York 6, N. Y.,

Proctors for Appellant.

ROBERT H. SCHNACKE,
United States Attorney;

KEITH R. FERGUSON,
Special Assistant to the Attorney General;

GRAYDON S. STARING,
Attorney, Admiralty and Shipping Section,
Department of Justice,
Room 447-A, Post Office Bldg.,
San Francisco 1, California,

Proctors for Appellee.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty—No. 27721

In Re TROJAN, on the Petition of the UNITED STATES OF AMERICA, as Owner, for Exoneration From or Limitation of Liability.

PETITION FOR EXONERATION FROM
OR LIMITATION OF LIABILITY

To the Honorable, the Judges of the United States District Court for the Northern District of California, Sitting in Admiralty:

The Petition of the United States of America, owner of the Tanker Trojan (ex Jeanny), in a cause of exoneration from or limitation of liability, civil and maritime, respectfully shows as follows:

I.

Petitioner is and at all times mentioned herein was a sovereign nation.

II.

The steam tanker Trojan (ex Jeanny) is and was at all material times a steel, ocean-going T2 tanker of 10,296 gross tons, registered under the laws of the United States, Official No. 247177.

III.

On April 22, 1955, Petitioner took title to the Steam Tanker Trojan (ex Jeanny) under a certain decree of forfeiture passed on that date by the

United States District Court for the Northern District of California in the case of United States of America vs. Tanker Jeanny, etc., Admiralty No. 26366, and thereafter and until on or about December 26, 1956, the Trojan was owned by Petitioner and berthed as a dead ship in the Suisun Bay Reserve Fleet of the United States Maritime Administration.

IV.

On December 26, 1956, pursuant to a certain contract of sale dated as of December 21, 1956, Petitioner sold and delivered the Steam Tanker Trojan (ex Jeanny) to Rotary Tankers Corporation, a Delaware corporation, which has since changed its name and is now known as Sheffield Tankers Corporation and will hereafter be so referred to. The sale price was \$2,308,488.00.

V.

On or about January 4, 1957, the Trojan, then named the Jeanny, was moved to Todd Shipyards, Alameda, California, for extensive reactivation repairs on behalf of Sheffield Tankers Corporation, and on January 29, 1957, at approximately 3:10 p.m., while she was moored afloat at a Todd Shipyard pier, undergoing repair, an explosion or explosions occurred within the after portion of the vessel followed by fire, which resulted in many deaths and personal injuries and much property damage. Repairs to the vessel had not been completed and the voyage of the vessel had not then commenced.

VI.

The explosion and fire aboard the Trojan January 29, 1957, and the resulting loss, damage and injury were solely and proximately caused by the negligence and fault of the Todd Shipyards Corporation, their servants, agents and employees and others not now known to Petitioner and were not caused or contributed to by any act, omission, fault, negligence or breach of duty of Petitioner and were done, occasioned and incurred without the privity or knowledge of Petitioner.

VII.

The Trojan was at all times during Petitioner's ownership thereof in all respects tight, staunch, strong and seaworthy and well and sufficiently fitted, supplied, equipped and furnished for the service in which she was engaged; at no time during Petitioner's ownership of the Trojan was she operated, but at all such times she was maintained as a dead ship and berthed in the Suisun Bay Reserve Fleet of the United States Maritime Administration. At all such times Petitioner exercised due diligence to make the Trojan in all respects seaworthy and properly fitted, supplied, equipped and furnished as set forth above for such status. At and about the time of the said explosion or explosions and fire aboard the Trojan, January 29, 1957, Petitioner had no custody or control of the vessel and no servants, agents or employees of Petitioner were on or about the vessel or participating in any activities with reference to her re-

pairs or the said explosion or explosions and fire, or in any way responsible therefor.

VIII.

Petitioner is informed and believes that the value of the Trojan on January 29, 1957, after the said explosion or explosions and fire in which the vessel was damaged, was the sum of \$1,918,653.60. The value of Petitioner's interest in the Trojan on January 29, 1957, immediately after the said explosion or explosions and fire was nil and there was no pending freight. The gross tonnage of the vessel without deduction on account of engine room less the space of 632 tons occupied by seamen and appropriated to their use is 9,664 tons. The vessel is in the possession of Sheffield Tankers Corporation, at Alameda, California.

IX.

Petitioner is informed and believes that there are no demands, liens or claims of lien in contract or in tort against the Trojan arising or existing on January 29, 1957, other than claims arising out of the said explosion or explosions and fire, except that Todd Shipyards Corporation, as libellant, has filed a certain action against Sheffield Tankers Corporation and the Trojan in the United States District Court for the Northern District of California, Admiralty No. 27506, claiming a lien in the total amount of approximately \$1,400,000.00 for work, labor, materials and supplies furnished to the vessel, some of which were furnished prior to the ex-

plosion or explosions and fire and some of which were furnished subsequent thereto. The proctors for the libelant in the said action are McCutchen, Thomas, Matthew, Griffiths & Greene, and Russell A. Mackey, Esq., whose address is 1400 Balfour Building, San Francisco 4, California.

X.

On December 20, 1957, Todd Shipyards Corporation, as cross-respondent, filed, in that certain action in the United States District Court for the Northern District of California, entitled Todd Shipyards Corporation vs. the Steam Tanker Trojan, Admiralty No. 27506, an impleading petition against the United States of America, alleging that Todd Shipyards Corporation was damaged by the explosion and fire aboard the Trojan, January 29, 1957, in an unspecified amount dependent upon claims made against Todd Shipyards Corporation, and claiming the recovery of all such damages from the United States of America, on the basis of alleged acts and failures to act of Petitioner as owner of the Trojan (ex Jeanny). The proctors for the cross-respondent in the said action are McCutchen, Thomas, Matthew, Griffiths & Greene, and Russell A. Mackey, Esq., whose address is 1400 Balfour Building, San Francisco 4, California. Pursuant to an order of consolidation, dated April 28, 1958, the said action, Admiralty No. 27506, was consolidated with, and under the caption of, that certain action in the United States District Court for the Northern District of California entitled,

In the Matter of the Petition of Sheffield Tankers Corp., etc., Admiralty No. 27543.

XI.

On April 8, 1958, Todd Shipyards Corporation, as libelant, filed, in that certain action in the United States District Court for the Northern District of California entitled Todd Shipyards Corporation vs. United States of America, Admiralty No. 27702, a libel against the United States of America, alleging that Todd Shipyards Corporation was damaged by the explosion and fire aboard the Trojan, January 29, 1957, in an amount in excess of \$8,000,000.00, and claiming the recovery of all such damages from the United States of America, on the basis of alleged acts and failures to act of Petitioner as owner of the Trojan (ex Jeanny). The proctors for the libelant in the said action are McCutchen, Thomas, Matthew, Griffiths & Greene, and Russell A. Mackey, Esq., whose address is 1400 Balfour Building, San Francisco 4, California.

XII.

On April 8, 1958, Todd Shipyards Corporation, as plaintiff, filed, in that certain action in the United States District Court for the Northern District of California entitled Todd Shipyards Corporation vs. United States of America, Civil No. 37181, a complaint against the United States of America, alleging that Todd Shipyards Corporation was damaged by the explosion and fire aboard the Trojan, January 29, 1957, in an amount in ex-

cess of \$8,000,000.00, and claiming the recovery of all such damages from the United States of America, on the basis of alleged acts and failures to act of Petitioner as owner of the Trojan (ex Jeanny). The attorneys for the plaintiff in the said action are McCutchen, Thomas, Matthew, Griffiths & Greene, and Russell A. Mackey, Esq., whose address is 1400 Balfour Building, San Francisco 4, California.

XIII.

In addition to the aforesaid suits, Petitioner is informed and believes that on behalf of certain of the persons injured or dead as a result of the said explosion or explosions and fire, or their personal representatives, the following suits have been filed and are now pending:

1. A suit against the Trojan, and Sheffield Tankers Corporation in the United States District Court for the Northern District of California, Southern Division, in Admiralty No. 27507, by John Polk and others, as libelants, claiming total damages on behalf of all the said libelants in the amount of \$1,001,500.00. Proctor for Libelants in the said suit is Jay A. Darwin, Esq., whose address is 68 Post Street, San Francisco.

2. A suit filed in the Superior Court in and for the County of Alameda, No. 281388, by Charles Cecil McNaughton, as plaintiff, against Sheffield Tankers Corporation and Todd Shipyards Corporation in the amount of \$50,000.00. The attorney for plaintiff in the said suit is Dudley Harkleroad

whose address is 351 California Street, San Francisco.

3. A suit filed against the Trojan and Sheffield Tankers Corporation in the United States District Court for the Northern District of California, Admiralty No. 27537, by Weldon Cochran and others, as libelants, claiming total damages on behalf of all the said libelants in the amount of \$375,000.00. Proctors for libelants in the said suit are Andrew Bodisco and George L. Cooke whose address is 465 California Street, San Francisco.

XIV.

Sheffield Tankers Corporation has filed, in the United States District Court for the Northern District of California, its petition for exoneration from or limitation of liability, Admiralty No. 27543, and numerous claimants have filed their claims therein. The names of such claimants and the names and addresses of their respective proctors are shown by the record in the said action.

XV.

It is expected that other claims will be made and suits filed against the United States of America as a result of the explosion or explosions and fire, in addition to the claims made by Todd Shipyards Corporation as described above. The total amount of such claims greatly exceeds the value of the interest of Petitioner in the Trojan immediately following the said explosion or explosions and fire.

XVI.

Petitioner, while not admitting that it is liable for any loss of life, personal injury or property damage, and reserving the right to contest in this or any other Court any liability therefor, desires to limit its liability, if any, for each and all claims whether for loss of life, personal injury, loss of property or damages in any manner arising out of the said explosion or explosions and fire and claims the benefit of the limitation of and exoneration from liabilities provided for in the Act of March 3, 1851, entitled: "Act to Limit the Liability of Shipowners and for Other Purposes," 46 U.S.C., 183-189, as now or hereafter amended and supplemented and as implemented by the Rules of Practice in Admiralty and Maritime Cases of the Supreme Court and the rule of this Honorable Court governing proceedings in admiralty.

XVII.

Petitioner, United States of America, being a corporation sovereign, is exempt from providing bonds or stipulations (28 U.S.C., 2408).

XVIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, Petitioner prays:

1. That this Honorable Court issue a monition against all persons claiming damages for any loss, damage or injury occurring as described in this

petition or asserting claims in respect of which Petitioner seeks exoneration of or limitation of its liability herein, citing them to file their respective claims under oath with the Clerk of this Court, and to serve on or mail to the proctors for Petitioner a copy thereof on or before a date to be named in the said monition, and that public notice of such monition be given, all as provided by law and by the rules of the Supreme Court and of this Court governing proceedings in admiralty; and that an injunction issue against the institution or prosecution of any suits, actions or legal proceedings of any nature or description whatsoever, in any Court whatsoever, except in this proceeding, against Petitioner in respect of any claim or claims arising out of or in connection with the said explosion or explosions and fire on the Trojan, or subject to limitation in these proceedings, until the hearing and determination of these proceedings, and citing any person claiming damages as aforesaid, who shall within the foregoing time have filed a claim, intending to contest the right to exoneration or limitation, to file an answer to this petition and serve on or mail to proctors for Petitioner a copy thereof.

2. That this Honorable Court permit Petitioner to contest its liability for all loss, destruction, damage, death or injury occurring as described herein, and that Petitioner be adjudged and decreed not liable therefor; or, if Petitioner be adjudged or decreed liable therefor, then that the Court adjudge

and decree that such liability shall in no case exceed the amount or value of the interest of Petitioner in and to the Trojan as the same existed after the said explosion or explosions and fire, as supplemented, if necessary, in accordance with 46 U.S.C., Sec. 183(b), and that the amount of such interest be divided pro rata among such claimants as may duly prove their claims in proportion to the amount of their several claims as adjudged by this Court and in accordance with law, and that a decree be entered discharging Petitioner from all further liability.

3. That, at the appropriate time, the Court consolidate this action with the Petition of Sheffield Tankers Corporation, Admiralty No. 27543, now on file.

4. That Petitioner may have such other, further or different relief as may be deemed meet and just in the premises.

LLOYD H. BURKE,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General;

/s/ GRAYDON S. STARING,
Attorney, Admiralty and Shipping Section, Department of Justice, Proctors for Petitioner.

Duly verified.

[Endorsed]: Filed May 2, 1958.

[Title of District Court and Cause.]

RESTRAINING ORDER AND ORDER
DIRECTING ISSUANCE OF MONITION

A petition having been filed herein on May 2, 1958, by the United States of America as Owner of the Steam Tanker Trojan for exoneration from or limitation of its liability against any and all claims arising out of or in connection with an explosion or explosions and fire aboard the Trojan on January 29, 1957, at the shipyard of Todd Shipyards Corporation in Alameda, California, all as more particularly described in the petition, resulting in the loss, death, injuries and damages stated in the petition; and

It Appearing that the petitioner, United States of America, is not required to furnish any bond or stipulation; and

It Further Appearing that on December 20, 1957, Todd Shipyards Corporation, as cross-respondent, filed, in that certain action in the United States District Court for the Northern District of California entitled Todd Shipyards Corporation vs. the Steam Tanker Trojan, Admiralty No. 27506, an impleading petition against the United States of America, alleging that Todd Shipyards Corporation was damaged by the explosions and fire aboard the Trojan, January 29, 1957, in an unspecified amount dependent upon claims made against Todd Shipyards Corporation, and claiming the recovery of all such damages from the United States of

America, on the basis of alleged acts and failures to act of Petitioner as owner of the Trojan (ex Jeanny) and that, pursuant to an order of consolidation dated April 28, 1958, the said action, Admiralty No. 27506, was consolidated with, and under the caption of, that certain action in the United States District Court for the Northern District of California entitled, In the Matter of the Petition of Sheffield Tankers Corp., etc., Admiralty No. 27543; and

It Further Appearing that on April 8, 1958, Todd Shipyards Corporation, as libellant, filed, in that certain action in the United States District Court for the Northern District of California entitled Todd Shipyards Corporation vs. United States of America, Admiralty No. 27702, a libel against the United States of America, alleging that Todd Shipyards Corporation was damaged by the explosions and fire aboard the Trojan, January 29, 1957, in an amount in excess of \$8,000,000.00, and claiming the recovery of all such damages from the United States of America, on the basis of alleged acts and failures to act of Petitioner as owner of the Trojan (ex Jeanny); and

It Further Appearing that on April 8, 1958, Todd Shipyards Corporation, as plaintiff, filed, in that certain action in the United States District Court for the Northern District of California entitled Todd Shipyards Corporation vs. United States of America, Civil No. 37181, a complaint against the United States of America, alleging that

Todd Shipyards Corporation was damaged by the explosions and fire aboard the Trojan, January 29, 1957, in an amount in excess of \$8,000,000.00, and claiming the recovery of all such damages from the United States of America, on the basis of alleged acts and failures to act of Petitioner as owner of the Trojan (ex Jeanny); and

It Further Appearing that no claim has been filed with Petitioner and no suits have been commenced against Petitioner as owner of the Trojan more than six months previous to the filing of its petition, claiming or seeking to recover damages for loss, death or personal injuries arising by reason of the said explosion or explosions and fire; now, on motion of Petitioner,

It Is Hereby Ordered that the commencement, institution or prosecution of any and all suits, actions, libels, or legal proceedings of any nature or description whatsoever, including particularly the impleading petition, libel and complaint described above, against Petitioner, except in this limitation of liability proceeding, in respect to any claim for loss, damage, or injury, whether of or to life or persons or property, in any manner arising out of the explosion or explosions and fire aboard the steam tanker Trojan on January 29, 1957, be, and the same are, hereby stayed and restrained until the hearing and determination of this proceeding; and

It Is Further Ordered that a monition issue out of and under the seal of this Court against any

and all persons, firms, corporations, or parties claiming damages from or against Petitioner by reason of any loss, damage, injury, or destruction, whether of or to life or persons or property, in any manner arising upon or out of the explosion or explosions and fire aboard the steam tanker Trojan on January 29, 1957, as set forth in the petition, citing and admonishing them and each of them to file their claims under oath with the Clerk of this Court and serve on or mail to petitioner's proctors, Lloyd H. Burke, Esq., United States Attorney; Keith R. Ferguson, Esq., Special Assistant to the Attorney General, and Graydon S. Staring, Esq., Attorney, Admiralty and Shipping Section, Department of Justice, Room 447-A (Box 502), Post Office Building, Seventh and Mission Streets, San Francisco 1, California, a copy thereof on or before the 17th day of June, 1958, or within such further time as the Court may grant, or be defaulted, and citing any person claiming damages as aforesaid, who shall within the foregoing time have filed his claim under oath and who intends to contest the right to exoneration or limitations, to file an answer to such petition and serve a copy thereof on proctors for Petitioner; and

It Is Further Ordered that public notice of such monition be given by the United States Marshal for the Northern District of California, Southern Division, by causing a Notice substantially as set forth under and pursuant to Rule 51 of the Admiralty Rules of the Supreme Court of the United

States to be published in The Recorder, a newspaper printed and published in the City and County of San Francisco, State of California, at least once a week for four consecutive weeks before the return day of the said monition; and

It Is Further Ordered that further notice of such monition be given by the United States Marshal by causing copies of the said Notice to be posted in three public places in the City and County of San Francisco, State of California; and

It Is Further Ordered that not later than the day of second publication a copy of such Notice and a copy of Supreme Court Rule 52 be mailed by Petitioner or its proctors to Todd Shipyards Corporation, 153 California Street, San Francisco, California, and to McCutchen, Thomas, Matthew, Griffiths & Greene, and Russell A. Mackey, Esq., 1400 Balfour Building, San Francisco 4, California, its proctors and attorneys, and to the last known address of each of those persons known to have lost their lives following said explosion or explosions and fire;

It Is Further Ordered that service of this order as a restraining order be made by Petitioner by mailing a copy of this order to Todd Shipyards Corporation, and to McCutchen, Thomas, Matthew, Griffiths & Greene, and Russell A. Mackey, Esq., its proctors and attorneys, and to the last known address of each of those persons known to have lost their lives following the explosion or explo-

sions and fire and, in any further suits or other proceedings, by delivery by the United States Marshal of a copy of this order to the persons, firms, or corporations to be restrained, or their attorneys or proctors.

Dated: May 2, 1958.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed May 2, 1958.

[Title of District Court and Cause.]

CLAIM OF TODD SHIPYARDS
CORPORATION

Comes now Todd Shipyards Corporation, a corporation (hereinafter called "Todd"), and makes claim against petitioner United States of America (hereinafter called the "Government"), and alleges on information and belief as follows:

I.

Todd is and at all the times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of New York and at all of said times owned, operated, managed, leased or controlled a certain ship repair yards and facilities in Alameda, California, within the jurisdiction of this Honorable Court.

II.

Sheffield Tankers Corporation, formerly named Rotary Tankers Corporation (hereinafter called "Sheffield"), is and at all the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware. That on and at all times subsequent to December 26, 1956, said Sheffield owned, operated, managed, controlled and was in possession of the T-2 type steam tank vessel Trojan, formerly named the Jeanny (hereinafter called the "Trojan").

III.

On or about December 26, 1956, and prior thereto, the Government owned, operated, managed, controlled and was in possession of said tank vessel Trojan, then named the Jeanny, bearing Official No. 247177, as a merchant vessel of the United States of America.

IV.

On or about December 26, 1956, the Government for good and valuable consideration, sold, delivered and transferred the said Trojan to Sheffield (then named Rotary Tankers Corporation), together with her apparel and outfit, and further separately sold for good and valuable consideration to said Sheffield, among other things, a quantity of oil located, among other tanks, in said vessel's port and starboard after bunker tanks. That all the oil so sold was sold by the Government as fuel oil of the character customarily used as bunker oil and

commonly described as Bunker C fuel oil (hereinafter called "Bunker C fuel oil").

V.

Thereafter and on or about January 4, 1957, Sheffield (then named Rotary Tankers Corporation), entered into a contract in writing with Todd for the performance by Todd at its ship repair yard, Alameda, California, of certain specified repairs, and to supply certain materials, all in connection with the preparation of said vessel for continued service as a merchant vessel of the United States of America. Thereafter the vessel was delivered to Todd's plant at Alameda, California, for such repairs.

VI.

On January 29, 1957, while said Trojan was lying afloat at Todd's ship repair yard, Alameda, California, as aforesaid, an explosion or explosions occurred in the port bunker tank and machinery spaces of said vessel, followed by fire. That said explosion or explosions and fire occurred while Sheffield, its crew, agents, servants, employees and representatives were engaged in heating the oil in the said bunker tanks and pumping said oil from the bunker tank to the boiler room and lighting of the boiler room fires and using said oil in connection therewith.

VII.

Said explosion or explosions and fire resulted in extensive physical and other damage to property of Todd and damage to the said Trojan and

Sheffield, including damages for detention of the vessel during the course of repair of said damage. Said explosion or explosions and fire also resulted in the death of one member of the crew of said Trojan and death of and personal injuries to others, including employees of Todd and certain subcontractors of Todd.

VIII.

By reason of the foregoing: Todd sustained extensive direct and other damages in the amount of approximately One Hundred Thousand Dollars (\$100,000); a number of suits in admiralty and actions at law have been commenced against Todd, individually, and against Todd and Sheffield, jointly and severally, on account of damages resulting from the personal injuries and deaths aforesaid; a cross-libel in admiralty has been commenced by Sheffield against Todd for physical damages sustained by the said Trojan and damages for detention of said vessel and for indemnity for the amount Sheffield may be adjudged and required to pay on account of the personal injury and death claims aforesaid, all in an aggregate amount in excess of Eight Million Dollars (\$8,000,000). Other claims may be asserted and suits filed in respect to matters concerning which claimant is not now informed in which event claimant will amend and asks leave to amend this claim accordingly.

IX.

At and prior to the time the Government sold, delivered and transferred said Trojan to Sheffield

and at the time the Government sold and delivered the oil in the aft bunker tanks of said vessel to Sheffield and at the time said vessel was placed by Sheffield at Todd's ship repair yard for the afore-said repairs, and on January 29, 1957, at the time the said explosion or explosions and fire occurred, said oil was not Bunker C fuel oil as represented and sold, but, on the contrary, in violation of the applicable statutes, regulations and said representations, was an admixture of highly volatile, inflammable, explosive and inherently or imminently dangerous substances which in fact made it highly volatile, inflammable, explosive and imminently dangerous or which became imminently explosive and dangerous and resulted in its throwing off vapors in explosive and dangerous quantities when heated or subjected to the intended uses and operations of fuel oil on tanker vessels such as the Trojan.

X.

Todd alleges that said explosion or explosions and fire which occurred on January 29, 1957, on board the Trojan with consequent extensive physical damage and other damage and personal injuries and death were, or may be held to be, the primary, proximate or efficient result of the fault and negligence of the Government by reason of the matters and things alleged herein. If Todd should be held to be under any liability therefor, which liability Todd hereby specifically denies, then any and all such liability would ultimately be the primary, proximate or efficient result of the fault and negli-

gence of the Government in that, among other things which will be shown at the trial herein, the Government, acting by and through the Maritime Administration, its agents, servants, representatives, and employees having custody, possession, supervision and control over the said Trojan and of the oil in her aft port and starboard bunker tanks, and those servants, agents, employees and/or representatives in charge of or having jurisdiction over bids, tenders and contract or contracts for the sale, transfer and delivery of said vessel, its apparel, appurtenances, inventory and of the fuel oil, consumable broached and unbroached stores; negligently:

1. Breached its representation, express or implied that the oil located in the vessel's port and starboard bunker tanks was Bunker C fuel oil;

2. Failed and neglected to inspect, sample and analyze the oil located in the port and starboard aft bunker tanks of said vessel before the sale and delivery thereof as consumable Bunker C fuel oil for said vessel;

3. Failed and neglected to inspect, sample and analyze the said oil before the sale and delivery of the vessel together with its appurtenances, inventory and equipment including the oil located in the port and starboard bunker tanks of said vessel;

4. Failed and neglected to make a proper or any gas or explosive mixture test of the port and

starboard aft bunker tanks of said vessel prior to the sale and delivery thereof to ascertain the condition and explosibility thereof and of the material in said tanks;

5. Failed and neglected to ascertain prior to the time of the sale and delivery of said vessel, its appurtenances, equipment and inventory and of the oil located in said vessel's port and starboard aft bunker tanks, that said material therein contained was admixed with highly volatile, inflammable, and explosive substances which rendered the same imminently and inherently dangerous when subjected to heating and normal usage as fuel and bunker oil.

6. Sold and delivered said vessel, her appurtenances, equipment and inventory and the oil in its port and starboard aft bunker tanks which oil was admixed with highly volatile, explosive and imminently or inherently dangerous substances without disclosure of such conditions;

7. Sold and delivered the oil contained in the port and starboard bunker tanks of said vessel, which oil was admixed with highly volatile, inflammable and imminently dangerous substances or which mixture would become explosive and imminently dangerous when subjected to the uses and operations intended.

8. Sold and delivered the oil contained in the port and starboard aft bunker tanks of said vessel representing the same expressly or impliedly, to

be Bunker C fuel oil and without disclosure that such material was admixed with highly volatile, inflammable, explosive and imminently or inherently dangerous substances;

9. Sold and delivered the oil contained in the port and starboard aft bunker tanks of said vessel as Bunker C fuel oil in contravention of the applicable provisions of Title 46, Code of Federal Regulations Parts 30-39, inclusive, "Rules and Regulations for Tank Vessels," and particularly Article 35.25-10 thereof;

10. Sold and delivered the material contained in the port and starboard aft bunker tanks of said vessel as Bunker C fuel oil in contravention of the applicable provisions of Title 46, U. S. Code, Section 881, and rules and regulations of the American Bureau of Shipping entitled, "Rules for the Classification and Construction of Steel Vessels," and particularly Section 36, Art. 24 thereof.

XI.

Todd alleges that said explosion or explosions followed by fire were or may be held to have been the primary, proximate or efficient result of the breaches, defaults and negligence of the Government as alleged herein.

XII.

By reason of the premises any and all such liability should be borne by the Government and if Todd should be held under any liability by reason of any of the matters alleged herein then and in

such event Todd is entitled to be indemnified by the Government to the extent of any such liability.

Wherefore, claimant Todd Shipyards Corporation, prays that it have and recover from the petitioner United States of America,

(a) Damages sustained by it herein to the amount of approximately One Hundred Thousand Dollars (\$100,000);

(b) For indemnity against any sum or sums which it may be adjudged to pay by reason of any of the matters or things stated or referred to herein, together with legal fees and expenses incurred in defending claims and suits asserted against it;

(c) Costs of suit; and

(d) Such other and further relief as to the Court may seem just and proper.

McCUTCHEN, THOMAS, MATTHEW, GRIF-
FITHS & GREENE,

/s/ CROWELL, ROUSE &
VARIAN,

Proctors for Claimant, Todd
Shipyards Corporation.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 12, 1958.

[Title of District Court and Cause.]

ANSWER OF CLAIMANT TODD
SHIPYARDS CORPORATION

Comes now claimant Todd Shipyards Corporation and answering the petition in the above entitled cause alleges, upon information and belief, the following:

I.

Admits the allegations of Article I of the said petition.

II.

Admits the allegations of Article II of the said petition.

III.

Admits the allegations of Article III of the said petition.

IV.

Admits that on or about December 26, 1956, the petitioner sold and delivered the Steam Tanker Trojan (ex Jeanny) to Rotary Tankers Corporation, a Delaware Corporation, which has since changed its name and is now known as Sheffield Tankers Corporation. Except as herein admitted the said claimant alleges that it does not have sufficient information to answer the allegations of Article IV of the said petition and therefore denies the same and demands strict proof thereof in and so far as material.

V.

Admits the allegations of Article V of the said petition.

VI.

Denies the allegations of Article VI of the said petition.

VII.

Admits that at no time during the petitioner's ownership of the Trojan was she operated but at all such times was maintained as a dead ship by the United States Maritime Administration and that at and about the time of the explosion or explosions and fire aboard the Trojan, January 29, 1957, petitioner had no custody or control of the vessel and no servants, agents or employees on or about the vessel or participating in any activities with reference to her repairs or the said explosion or explosions and fire. Except as herein admitted the said claimant denies the allegations of Article VII of the said petition.

VIII.

Admits that the value of the Trojan following the explosion or explosions and fire did not exceed \$1,918,655.63, admits that the value of petitioner's interest at said time was nil and that there was no pending freight, admits that the gross tonnage of the vessel was 10,296 tons and admits that at the time of the filing of the petition the vessel was at Alameda, California in the possession of Sheffield Tankers Corporation, and except as herein admitted alleges that it is without information or belief concerning the allegations of Article VIII of the said petition and therefore denies the same and

demands strict proof thereof if and so far as material.

IX.

Admits the allegations of Article IX of the said petition.

X.

Admits the allegations of Article X of the said petition.

XI.

Admits that a libel against the petitioner was filed in this Court on April 2, 1958, and hereby refers to the said libel, No. 27702 in Admiralty, for its statement of the allegations of the claimant therein.

XII.

Admits that a complaint against the petitioner was filed in this Court on April 2, 1958, and hereby refers to the said complaint, Civil No. 37181, for its statement of the allegations of the claimant therein.

XIII.

Admits the allegations of Article XIII of the said petition, except that the said claimant alleges on information and belief as follows:

1. The total amount of damages claimed in the suit by John Polk and others is \$1,015,000.00.

2. The suit by Charles Cecil McNaughton was removed to the above entitled court and is now pending therein as Civil No. 36484.

XIV.

Admits the allegations of Article XIIV of the said petition.

XV.

Admits the allegations of Article XV of the said petition.

XVI.

Admits that the said petitioner by its petition claims limitation of and exoneration from liability, and except as so admitted the said claimant denies the allegations of Article XVI of the said petition.

XVII.

Admits the allegations of Article XVII of the said petition.

XVIII.

Denies the allegations of Article XVIII of the said petition.

Wherefore, claimant Todd Shipyards Corporation prays:

(1) that the petition be dismissed;

(2) if the petition is not dismissed, that it have judgment in accordance with its claim;

(3) that it have judgment for its cost of suit; and

(4) that it have such other relief as to the Court may seem just.

/s/ McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE,

/s/ CROWELL, ROUSE & VARIAN,
Proctors for Claimant Todd
Shipyards Corporation.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 12, 1958.

[Title of District Court and Cause.]

NOTICE OF PETITION FOR EXONERATION FROM OR LIMITATION OF LIABILITY

Notice is given that the United States of America has filed a petition pursuant to Title 46, United States Code, Sections 183-189, claiming the right to exoneration from or limitation of liability for all claims arising out of the explosion or explosions and fire on board the steam tanker Trojan in the shipyard of Todd Shipyards Corporation, at Alameda, California, on January 29, 1957.

All persons having such claims must file them under oath as provided in United States Supreme Court Admiralty Rule 52 with the Clerk of this Court and serve on or mail to petitioner's proctors, Lloyd H. Burke, Esq., United States Attorney, Keith R. Ferguson, Esq., Special Assistant to the Attorney General, and Graydon S. Staring, Esq., Attorney, Admiralty and Shipping Section, Department of Justice, a copy on or before 9:30 a.m. on the 17th day of June, 1958, or be defaulted. Personal attendance is not required.

Any claimant desiring to contest the claims of the petitioner must file an answer to the said petition as required by United States Supreme Court Admiralty Rule 53 and serve on or mail to the petitioner's proctors a copy on or before 9:30 a.m. on the 17th day of June, 1958, or be defaulted.

FRANK O. BELL,
United States Marshal.

By /s/ JOHN A. ROSEEN,
Deputy Marshal.

Received: May 2, 1958.

[Endorsed]: Filed June 17, 1958.

[Title of District Court and Cause.]

MONITION

The President of the United States, to the Marshal of the United States of America for the Northern District of California, Greeting:

Whereas, a petition was filed in the United States District Court for the Northern District of California, Southern Division, on the 2nd day of May, 1958, by the United States of America, a sovereign nation, praying for exoneration from or limitation of its liability, if any, concerning the loss, damage, injury or destruction occasioned by or resulting from the explosion or explosions and fire aboard

the steam tanker Trojan, on January 29, 1957, in the shipyard of Todd Shipyards Corporation at Alameda, California, where the Trojan was then lying for repairs in preparation for a voyage not yet begun, all as more fully set forth in the said petition, and praying for the issuance of monition as provided by law and the rules of this Court; and

Whereas, the petitioner United States of America is exempt from filing bonds or stipulations; and

Whereas, an order has been entered herein that a monition issue as prayed for; now, therefore

You are commanded to cite and admonish all persons, firms, corporations and parties claiming damages against the Petitioner or its agents for any loss, damage, injury or destruction of any kind resulting from the said explosion or explosions and fire, and all persons asserting claims in respect of which the Petitioner by the said petition seeks exoneration from or limitation of liability, that each and all such persons file their respective claims with the Clerk of this Court and serve on or mail to the proctors for the Petitioner a copy thereof on or before June 17, 1958, at 9:30 o'clock a.m. of the said day, or be defaulted; and

You are further commanded to cite and admonish such claimants as may desire to contest the Petitioner's right to exoneration from or limitation of its liability to appear and file an answer to the said petition and serve on or mail to proctors for

the Petitioner a copy of such answer, on or before 9:30 a.m. on June 17, 1958, or be defaulted; and

You are further commanded to cause public notice of this monition to be given substantially in the form prescribed by United States Supreme Court Admiralty Rule 51, by publishing such notice of monition once each week for four consecutive weeks before the return day of this monition in *The Recorder*, a daily newspaper of general circulation, printed and published in the City of San Francisco, State of California; and

You are further commanded to cause copies of the said notice to be posted in three public places in the City and County of San Francisco, State of California.

And what you have done in the premises do you then make return to this Court together with this writ.

Witness the Honorable Louis E. Goodman, United States District Judge, this 2nd day of May, 1958.

[Seal] CARL W. CALBREATH,
Clerk.

By /s/ J. P. WELSH,
Deputy.

LLOYD H. BURKE,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ GRAYDON S. STARING,
Attorney, Admiralty and Shipping Section, Department of Justice, Proctors for Petitioner.

Received: May 2, 1958.

[Endorsed]: Filed June 17, 1958.

[Title of District Court and Cause.]

MARSHAL'S RETURN

I hereby certify and return that, as directed by an order made by the above-entitled Court on the 2nd day of May, 1958, and as commanded by the Monition issued on the same day under the seal of the said Court, I have cited and admonished all persons, firms, corporations, and parties claiming damages from or against Petitioner or its agents for any loss, damage, injury or destruction of any kind resulting from the explosion or explosions and fire aboard the steam tanker Trojan, on January 29, 1957, in the shipyard of Todd Shipyards Corporation at Alameda, California, as set forth in the Petition, and all persons asserting claims in respect of which Petitioner seeks exoneration from or limitation of liability, to file their claims under oath with the Clerk of this Court and serve on or mail to Petitioner's proctors, Lloyd H. Burke, Esq., United States Attorney, Keith R. Ferguson, Esq., Special Assistant to the Attorney General and Graydon S. Staring, Esq., Attorney, Admiralty and Shipping Section, Department of Justice, Room

447-A, Post Office Building, Seventh and Mission Streets, San Francisco 1, California, a copy thereof on or before 9:30 a.m. on the 17th day of June, 1958, or be defaulted, and have cited such claimants as may desire to contest Petitioner's right to exoneration from or limitation of its liability, to appear and file an answer to the said petition and serve on or mail a copy thereof to proctors for Petitioner on or before 9:30 a.m. on June 17, 1958, or be defaulted; that I have given public notice of the said Monition by causing a notice substantially in the form prescribed by Rule 51 of the Admiralty Rules of the Supreme Court of the United States to be published once each week for four consecutive weeks before the return day of the Monition in *The Recorder*, a daily newspaper of general circulation, printed and published in the City of San Francisco, State of California, as shown by the attached affidavit by the principal clerk of The Recorder Printing and Publishing Company, printers and publishers of the said newspaper, which affidavit is hereby referred to and made a part hereof as if fully set forth and incorporated herein; and that I have given further public notice of the said Monition by posting copies of the said notice in three public places in the City and County of San Francisco, State of California, to wit, one in the Post Office Building, Seventh and Mission streets, one at the Appraisers Building, 630 Sansome Street, and one at the City Hall, McAllister and Polk Streets.

I hereby certify and return that there have been

no further suits or other proceedings wherein it has been necessary to deliver a copy of the Restraining Order to any persons, firms, or corporations.

Dated: San Francisco, California, June 12, 1958.

[Seal] /s/ FRANK O. BELL,
United States Marshal.

[Endorsed]: Filed June 17, 1958.

[Title of District Court and Cause.]

CLAIM OF THE TRAVELERS INSURANCE
COMPANY

Comes now The Travelers Insurance Company, a corporation, and makes claim against Petitioner United States of America as follows:

Article I.

That at all times mentioned herein The Travelers Insurance Company, hereinafter called Travelers, was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Connecticut, and duly licensed to carry on an insurance business, including compensation insurance in the State of California.

Article II.

That at all times mentioned herein Travelers was the compensation insurer of Todd Shipyards

Corporation, hereinafter referred to as Todd, and that Todd was on the 29th day of January, 1957, making repairs on the tanker Trojan, and such other work as was deemed necessary to the reactivation of said vessel. That said vessel was at said time lying afloat at Todd's Shipyard, Alameda County, California.

Article III.

That on said 29th day of January, 1957, explosions occurred on board the Trojan and were followed by fire. For convenience the said explosions and fire will be referred to hereinafter as the explosion. That the explosion caused fatal injuries to Max J. Gladstone and injuries to Frank Davis and Norman Westby. These men were employees of Todd and were engaged in the work of repair and reactivation being carried out by Todd. That by reason of the premises the said men were business invitees of Sheffield Tankers Corporation, hereinafter called Sheffield, the said owner of the tanker Trojan.

Article IV.

Sadie Gladstone, the widow of Max J. Gladstone, deceased, Frank Davis and Norman Westby elected to take compensation and benefit under and pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424 c. 509, sec. 3, 33 U.S.C. sec. 903 et seq.). Because of said election the Deputy Commissioner for the 13th Compensation District, U. S. Department of Labor, Bureau of Employees Compensation, entered awards

in the three cases. Travelers has as compensation insurance carrier up to June 1, 1958, which includes a period before as well as after the said awards, paid the following:

To Sadie Gladstone, compensation totaling \$1,-842.75 and \$400 burial expenses.

To Frank Davis, \$119.93 compensation.

To Norman Westby, \$31.18 compensation.

That the compensation benefits may, under said award to said Gladstone, continue for a period which has not and cannot now be determined. That Travelers prays leave to amend its claim to set out any additional compensation or benefits under said Act or award paid to Sadie Gladstone subsequent to said date.

Article V.

That by reason of the circumstances above set out, Travelers was subrogated to the right of said parties, and each of them, namely, Sadie Gladstone, Frank Davis and Norman Westby, to any claim for damages against the United States of America.

Article VI.

Upon information and belief, that on or about December 26, 1956, and prior thereto, the United States of America, hereinafter called the Government, owned, managed, controlled and was in possession of said Trojan (then named the Jeanny) bearing official number 247177, a merchant vessel of the United States of America.

Article VII.

Upon information and belief, that on or about December 26, 1956, the Government, for valuable consideration pursuant to sale theretofore made, delivered and transferred the said Trojan to Sheffield (then named Rotary Tankers Corporation), together with her apparel and outfit; and that on or about said date separately sold for valuable consideration to said Sheffield, among other things, a quantity of oil located in said vessel's port and starboard after bunker tanks. That all of the said oil was sold by the Government as fuel oil of the character customarily used as bunker fuel oil and commonly described as "Bunker C."

Article VIII.

Upon information and belief, that thereafter and on or about January 4, 1957, said Sheffield entered into a contract in writing with Todd for the performance by Todd at its ship repair yards at Alameda, California, of certain reactivation repairs, and to supply certain materials, all in connection with the repair and reactivation of said vessel for continued service as a merchant vessel of the United States of America. Thereafter, the said vessel was delivered to Todd at Alameda, California, for the making of such repairs necessary to the reactivation of said vessel and that Todd engaged many workmen (of several crafts), including those hereinabove named, to go on board said vessel and make said repairs.

Article IX.

Upon information and belief, that on January 29, 1957, while said Trojan was lying afloat Todd's ship repair yards, Alameda, California, an explosion or explosions occurred in the after part of said vessel, including certain machinery and boiler spaces, followed by fire. That said explosions and fire (hereinafter referred to as explosion) occurred while Sheffield, its servants, employees and representatives were engaged in heating the oil in said bunker tanks which, as hereinabove set out, had been sold by the Government to Sheffield as Bunker C, and pumping said fuel oil from the port bunker tank to the boiler room and lighting off the boiler room fires in connection with the preparation of reactivating said vessel that it could be put in operation as a merchant vessel of the United States of America.

Article X.

That the said explosion caused extensive physical damage to the said Trojan and caused fatal injuries to several employees of Todd and one member of the ship's crew then on board said vessel, and injuries in varying degrees of severity to over forty others, who were employees of Todd; also fatal injuries to a member of the ship's crew, an employee of Sheffield, and injuries to two other employees of a subcontractor, who had entered into an agreement with Todd to do a part of the repair work to said Trojan.

Article XI.

Upon information and belief, that the Government had knowledge that Sheffield had purchased the Trojan for the purpose of making reactivation repairs on the Trojan and operating said vessel as a merchant vessel of the United States of America; and further that the Government had actual knowledge that the said reactivation repairs had been commenced by Todd in its shipyard and that numerous employees and others would and had been going on board said vessel for various purposes, all in connection with the repair and reactivation of said Trojan.

Article XII.

Upon information and belief, that the Government negligently failed to make an analysis to determine whether said fuel oil in the after bunker tanks of the Trojan was in fact Bunker C, and represented either actually or impliedly to Todd and their employees, agents, and servants and all others who would go on board said vessel in connection with making reactivation repairs and fitting said vessel to be operated as a merchant vessel of the United States of America, that said fuel oil was Bunker C.

Article XIII.

Upon information and belief, that the aforesaid negligence of the Government and its representation were proximate causes of the said explosion resulting in damage to property and persons.

Article XIV.

Upon information and belief, that the said bunker fuel oil contained in the bunker tanks contained in the after part of said Trojan was not in fact Bunker C fuel oil, but, on the contrary, was an admixture of highly volatile, inflammable explosive and dangerous substances which caused said fuel oil to throw off, when heated, highly volatile, inflammable, explosive, and dangerous vapor in explosive and injurious quantities; and that the heating of said fuel oil in connection with the repair and reactivation of said Trojan was work customarily done in connection with preparation or the operation of a merchant vessel and was to be expected by the Government that it would have been.

Article XV.

That the representation of the Government that the oil contained in the after bunker tanks of said vessel was Bunker C and negligent failure to ascertain whether in fact it was Bunker C was in contravention of the applicable provisions of 46 Code of Federal Regulations, Parts 30-39, inclusive, "Rules and Regulations for Tanker Vessels," and particularly, Art. 35.25-10 thereof, and also in contravention of the provisions of Title 46 U.S.C., Sec. 81, Rules and Regulations of the American Bureau of Shipping, "Rules for the Classification and Construction of Steam Vessels," and particularly, Sec. 26, Art 24 thereof.

Article XVI.

That as a result of the fatal injuries and death of Max J. Gladstone, Sadie Gladstone has been deprived of the support of said decedent upon whom she was dependent and from whom she received very substantial contribution and that the said Sadie Gladstone has suffered and will continue to suffer pecuniary loss by reason of the deprivation to her of the support, love, affection, comfort and society of the said decedent. That by reason of the premises, Sadie Gladstone has suffered damages in the amount of \$100,000.00.

Article XVII.

That the said Frank Davis has, because of said injuries, suffered damages by reason of loss of earnings and pain and suffering in the amount of \$2,500.00; and the said Norman Westby has suffered damages by reason of loss of earnings and pain and suffering in the amount of \$2,000.

As and for a further claim, Travelers alleges:

Article XVIII.

Refers to the allegations of Articles I and II above and by such reference incorporates said allegations and makes the same the allegations of this article.

Article XIX.

That the said explosion which occurred on the Trojan on said 29th day of January, 1957, caused

injuries to William Martin Maas, Jr., from which he died. That the said William Martin Maas, Jr., was an employee of Todd and engaged in the work of repairs and reactivation being carried out by Todd on board said vessel. That by reason of the premises the said William Martin Maas, Jr., was a business invitee of Sheffield.

Article XX.

Refers to the allegations of Articles VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV above and by such reference incorporates said allegations and makes the same the allegations of this article.

Article XXI.

Upon information and belief, that the said William Martin Maas, Jr., left no dependents who are entitled to compensation or other benefits under the Longshoremen's and Harbor Workers' Compensation Act and that the said William Martin Maas, Jr., left him surviving no person or personal representative who is entitled to bring suit for damages, on account of his death.

Article XXII.

That Travelers has paid to the Secretary-Treasurer of the United States through the Deputy Commissioner of the 13th Compensation District the sum of \$1,000.00, pursuant to and as required by the said Act (33 U.S.C.A., Section 944).

Article XXIII.

That by reason of said payment of \$1,000.00, any cause of action for wrongful death of said William Martin Maas, Jr., has been assigned by operation of law to Travelers (33 U.S.C.A. under Section 933(c)). That in the premises Travelers is entitled to damages in the sum of \$1,000.00.

As and for a further claim, Travelers alleges:

Article XXIV.

Refers to the allegations of Articles I and II above, and by such reference incorporates said allegations and makes the same the allegations of this Article.

Article XXV.

That the said explosion which occurred on the Trojan on said 29th day of January, 1957, caused injuries resulting in the death of, in addition to Max J. Gladstone and William Martin Maas, Jr., named above, the following persons: William L. Evans, Robert P. Gainey, Herbert J. Gauthier, Floyd Harper, Roosevelt McIntyre, Elbert N. Player and Pete Stanovich; and injuries to the following persons, in addition to Frank Davis and Norman Westby, named above: John Allison, James Archie, Oscar Asplind, Phillip Bressell, Charles Ballew, Rudey Bohm, Abrem Bitle, Clovis Campbell, John Casey, Thos. Chapman, Elmer Cleaver, Weldon Cochran, James Coleman, Eddie Cobbs, Ted Carpenter, Henry Frison, Eugene Fitch, R. H. Hawthorne, Geo. Hinkley, John Hines, Willie

Howard, Silvert Hansen, Milton Johnson, K. C. Kahlert, Ulrich Kale, Lee Kilpatrick, James Lewis, Carl Larson, Theodore Moore, Wilfred Molden, Ruben May, Jr., Marion E. Oldham, John Polk, James Prater, Billie B. Rawson, Sam Roberts, Moses Rogers, Chester Smith, Alfred Stief, Clark Truax, Frank Tucker, Kee Welch, Willie Wise and Robert Wilcox.

Article XXVI.

Travelers is informed and believes and therefore alleges that the personal representatives of the foregoing deceased persons have filed or will file claim in these proceedings and that the persons listed above as having been injured have also filed claim or will file claim in these proceedings and that the persons listed above as having been injured have also filed claim or will file claim in this proceeding.

Article XXVII

That without the entry of a formal award, Travelers has paid compensation and benefits under the Longshoremen's and Harbor Workers' Compensation Act as indicated below:

Death Cases		Statutory Medical Aid and Funeral Expenses
Name		
William L. Evans.....	\$	15.00
Robert P. Gainey.....		1,454.90
Herbert J. Gauthier.....		1,850.00
Floyd Harper		1,123.00
Roosevelt McIntyre '.....	
Elbert N. Player.....		15.00
Pete Stanovich		400.00

Injury Cases

Name	Compensation	Statutory Medical Aid	Total
John Allison	\$ 254.57	\$ 580.58	\$ 835.15
James Archie	956.57	3,947.69	4,904.26
Oscar Asplind	308.57	450.23	758.80
Phillip Bressell	80.00	136.89	216.89
Chas. Ballew	1,134.00	1,592.35	2,726.35
Rudey Bohme	80.00	10.00	90.00
Abrem Bitle	856.28	285.53	1,141.81
Clovis Campbell	378.00	881.93	1,259.93
John Casey	200.57	291.26	491.83
Thos. Chapman	1,064.57	1,084.91	2,149.48
Elmer Cleaver	1,998.00	4,703.57	6,701.57
Weldon Cochrane	1,188.00	899.87	2,087.87
James Coleman	486.00	279.59	765.59
Eddie Cobbs	69.43	2.34	71.77
Ted Carpenter	57.06	57.06
Henry Frison	370.28	692.76	1,063.04
Eugene Fitch	455.19	221.75	676.94
R. H. Hawthorne.....	80.00	64.15	144.15
Geo. Hinkley	848.57	477.15	1,325.72
John Hines	324.00	101.62	425.62
Willie Howard	69.43	125.52	194.95
Silvert Hansen
Milton Johnson	123.43	430.31	553.74
K. C. Kahlert.....	80.00	22.60	102.60
Ulrich Kale	439.71	679.71	1,119.42
Lee Kilpatrick	432.00	82.05	514.05
James Lewis	69.43	15.00	84.43
Carl Larson	316.28	157.00	473.28
Theodore Moore	254.57	619.33	873.90
Wilfred Molden	1,458.00	901.21	2,359.21
Ruben May, Jr.....	1,998.00	2,829.34	4,827.34
Marion E. Oldham.....	817.28	2,249.15	3,066.43
John Polk	540.00	4,214.07	4,754.07
James Prater	486.00	72.33	558.33
Billie B. Rawson.....	80.00	366.73	446.73

Injury Cases

Name	Compensation	Statutory Medical Aid	Total
Sam Roberts	\$ 80.00	\$ 30.70	\$ 110.70
Moses Rogers	2,268.00	1,562.23	3,830.23
Chester Smith	2,106.00	8,230.23	10,336.23
Alfred Stief	308.57	154.03	462.60
Clark Truax	647.99	2,076.38	2,724.37
Frank Tucker	902.57	414.82	1,317.39
Kee Welch	686.57	1,351.90	2,038.47
Willie Wise	185.14	371.46	556.60
Robert Wilcox	2,052.00	1,242.54	3,294.54

That the foregoing amounts represent payments made to and including June 14, 1958, and Travelers begs leave to set up by way of amendment any additional payments made.

Article XXVIII.

That the persons whose names are set out hereinabove were all employees of Todd and were working on board the said Trojan and engaged in making repairs and other work in connection with the reactivation being carried out by Todd. That by reason of the premises said persons were business invitees of Sheffield, the owner of the tanker Trojan.

Article XXIX.

Refers to the allegations of Article VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV above, and by such reference incorporates said allegations and makes the same the allegations of this article.

Article XXX.

That to the extent Travelers has paid compensa-

tion or medical benefits under the said Act, it is subrogated to the rights which arose by reason of injury to or death of the persons named in Article XXV above.

Wherefore, The Travelers Insurance Company, a corporation, prays judgment against Petitioner United States of America in the amount of \$100,000.00 damages suffered by Sadie Gladstone, \$2,500.00 damages suffered by Frank Davis, and \$2,000.00 damages suffered by Norman Westby; that said Travelers be awarded out of each judgment for damages in favor of each of said persons which may be paid, respectively: \$2,242.75, \$119.93 and \$31.18; that judgment be entered for said Travelers for \$1,000.00 by reason of the payment of said amount to the Secretary-Treasurer of the United States because of the death of William Martin Maas, Jr.; that out of any judgment entered against United States of America because of injury to, or because of the death of any person whose name appears in Article XXV above; that said Travelers be awarded the total amount paid under the Longshoremen's and Harbor Workers' Compensation Act, in each case, which amount is set out in Article XXVII above opposite each person named; and such additional amounts as may be paid or become due in future under the said Act or any award by reason of the death of or injury to any person named in any Article above; together with costs of suit herein incurred and such other and

further relief as this Honorable Court may deem meet and just in the premises.

DORR, COOPER & HAYS,

/s/ JAY T. COOPER,
Proctors for Claimant, The Travelers Insurance
Company.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 17, 1958.

[Title of District Court and Cause.]

ANSWER OF CLAIMANT
THE TRAVELERS INSURANCE COMPANY

Comes now claimant, The Travelers Insurance Company, a corporation, and answering the Petition in the above-entitled cause, admits, denies and alleges as follows:

I.

Admits the allegations of Article I.

II.

Admits the allegations of Article II.

III.

Admits the allegations of Article III.

IV.

Alleges that it does not have sufficient knowledge

or information to answer the allegations of Article IV and therefore denies the same; except that it admits on information and belief that the steam tanker Trojan (then named the Jeanny) was delivered to Rotary Tankers Corporation, a corporation, on or about December 26, 1956, which corporation has changed its name and is now known as Sheffield Tankers Corporation and will hereinafter be referred to as Sheffield.

V.

Upon information and belief, admits the allegations of Article V.

VI.

Denies each and every, all and singular, the allegations of Article VI. Claimant has no knowledge or information as to the identity of the persons or parties referred to by Petitioner in said article as "others not known to Petitioner" and therefore can not answer that part of said article but reserves the right to do so when informed in that regard.

VII.

Upon information and belief, denies each and every, all and singular and allegations of Article VII, except that claimant admits that Petitioner had no custody or control of the vessel and that none of Petitioner's servants, agents, or employees were on or about the vessel or participating in any activities with reference to her repairs.

VIII.

Upon information and belief, admits the allegations of Article VIII.

IX.

Upon information and belief, admits the allegations of Article IX.

X.

Admits the allegations of Article X.

XI.

Upon information and belief, admits the allegations of Article XI.

XII.

Upon information and belief, admits the allegations of Article XII.

XIII.

Admits the allegations of Article XIII of the said petition, except that claimant alleges on information and belief as follows:

1. That the total amount of damages claimed in the suit by John Polk and others is \$1,015,000.00.

2. The suit by Charles Cecil McNaughton was removed to the above-entitled Court and is now pending therein as Civil No. 36484.

XIV.

Admits the allegations of Article XIV.

XV.

Admits the allegations of Article XV and in regard to the value of any interest of Petitioner, alleges that said Petitioner had no interest whatsoever in said vessel at said time.

XVI.

Denies each and every, all and singular the allegations of Article XVI, except that it admits that said Petitioner claims limitation of and exoneration from liabilities under certain acts, rules of practice and rules of this Honorable Court governing proceedings in admiralty.

XVII.

Admits the allegations of Article XVII.

XVIII.

Denies each and every, all and singular the allegations of Article XVIII, except to the extent that the allegations have been hereinabove admitted.

Wherefore, claimant The Travelers Insurance Company prays:

1. That the petition herein be dismissed;
2. That if the petition be not dismissed, that it have judgment in accordance with its claims filed herein;
3. That it have judgment for its costs of suit herein incurred; and

4. For such other and further relief as to this Honorable Court may seem meet and just in the premises.

DORR, COOPER & HAYS,

/s/ JAY T. COOPER,

Proctors for Claimant, The Travelers Insurance
Company.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 17, 1958.

[Title of District Court and Cause.]

CLAIM OF ETHEL M. PLAYER

Ethel M. Player, hereby makes claim in the above-entitled proceeding for limitation of liability, and in support thereof alleges:

I.

That claimant is the surviving spouse and sole heir at law of Albert N. Player, deceased:

II.

Petitioner is and at all times mentioned herein was a sovereign nation.

III.

The Steam tanker Trojan (ex Jeanny) is and was at all material times a steel ocean-going T2 tanker, which petitioner alleges to be of 10,296 gross tons,

registered under the laws of the United States, Official No. 247177.

IV.

On April 22, 1955, petitioner took title to the steam tanker Trojan (ex Jeanny) under a certain decree of forfeiture passed on that date by the United States District Court for the Northern District of California in the case of United States of America vs. Tanker Jeanny etc., Admiralty No. 26366, and thereafter and until on or about December 26, 1956, the Trojan (ex Jeanny) was owned by petitioner and berthed as a dead ship in the Suisun Bay Reserve Fleet of the United States Maritime Administration.

V.

That on December 26, 1956, pursuant to a certain contract of sale dated as of December 21, 1956, petitioner sold and delivered the Steam Tanker Trojan (ex Jeanny) to Rotary Tankers Corporation, a Delaware Corporation, which has since changed its name and is now known as Sheffield Tankers Corporation and will hereinafter be so referred to. That at all times since said last mentioned date, Sheffield Tankers Corporation has been, and on January 29, 1957, was, and ever since has been and is now the owner of said Steam Tanker Trojan (ex Jeanny).

VI.

That on or about January 29, 1957, said Albert N. Player, deceased, was an employee of Todd Shipyard, a corporation, and working aboard said ship while the same was, pursuant to a contract of

repair, moored afloat in navigable waters in the City of Alameda, County of Alameda, State of California, adjacent to a pier operated by Todd Shipyard, a corporation.

VII.

That at said time and place, while said Albert N. Player, deceased, was working aboard said vessel, an explosion or explosions occurred aboard the vessel and said explosion or explosions were followed by fire.

VIII.

That claimant is informed and believes and upon such information and belief alleges that said explosion or explosions were directly and proximately caused by the joint and concurrent negligence, carelessness and fault on the part of petitioner, United States of America, its agents, servants, and employees, and of Sheffield Tankers Corporation, its agents, servants, and employees, in the following particulars, to wit:

(1) Negligent operation of said vessel, its appurtenances, equipment, fuel tanks, fuel oil, cargo holds, and of the associated equipment appurtenant thereto;

(2) Negligent and careless procedure on the part of petitioner, its agents, servants, and employees, in the manner of preparing said vessel, its fuel tanks and contents, and its associated equipment appurtenant thereto, for its removal from its status as a dead ship in the Suisun Bay Reserve

Fleet of the United States Maritime Administration, to its aforesaid reactivation operations;

(3) Negligent failure on the part of both petitioner and Sheffield to ascertain and determine the quality and chemical characteristics of the fuel oil in the bunker tanks of said vessel and/or the "flash point" of said fuel oil, at any time after April 22, 1955, and prior to the heating up of said fuel oil and the lighting off of the boilers of said vessel on said 29th day of January, 1957;

(4) Negligent and careless procedure in the heating up of the vessel's fuel oil, and in the lighting off of the boilers of said vessel;

(5) Failure on the part of both petitioner and Sheffield to provide claimant with a safe and seaworthy vessel in which to perform his work, in violation of the General Maritime Laws in said connection;

(6) Failure on the part of both petitioner and Sheffield to warn said Albert N. Player, deceased, of the existing and pre-existing dangerous and defective condition of said vessel, or of its fuel oil, fuel tanks, cargo holds, boilers, and of the associated equipment appurtenant thereto, which said dangerous and defective condition petitioner and Sheffield well knew or had reason to know, or by the exercise of ordinary care and prudence should have known or had knowledge;

(7) Failure on the part of petitioner and/or Sheffield to use due care or any care to remedy

or take precautions against said dangerous and defective conditions of heating up said fuel oil and of lighting off the boilers of said vessel;

(8) Failure of petitioner and Sheffield to maintain said vessel in a safe and seaworthy condition;

(9) Other negligent acts on the part of petitioner and Sheffield, and of their respective agents, servants and employees, with respect to said vessel, its fuel tanks, fuel oil, boilers, and of the associated equipment appurtenant thereto, not with certainty known to claimant at the time of filing of this claim, but which negligent acts are within the knowledge of petitioner and Sheffield.

IX.

That as a direct and proximate result of said explosion or explosions and fire and the other negligent acts as hereinbefore alleged said Albert N. Player, deceased, sustained injuries from which he died on the 29th day of January, 1957.

X.

That as a direct and proximate result of the joint and concurrent negligence and carelessness of petitioner and Sheffield as hereinabove alleged claimant has been deprived of the support, love, affection, devotion, companionship, and care of a loving and devoted husband and has been generally damaged thereby in the sum of \$150,000.00.

XI.

That by reason of the carelessness and negligence of said petitioner and Sheffield as hereinabove alleged claimant was required to and did expend monies for the burial of said Albert N. Player, deceased, the exact amount of which is unknown at this time, and for which claimant prays leave to amend this claim to insert the sum herein when they shall become known.

Wherefore, claimant, Ethel M. Player, prays that her said claim be allowed against said petitioner, United States of America in said sum and amount of \$150,000.00; and that Claimant have and be awarded judgment against said petitioner, without diminution or limitation, in said sum; and that claimant be awarded, in addition thereto, all of her costs and necessary expenses which she has heretofore or which she may hereafter incur in connection with this proceeding; and for such other further relief as to this Honorable Court may appear just and equitable in the premises, and for general relief.

Dated: July 15, 1958.

/s/ PHILIP J. DOYLE,

/s/ WILBUR C. COLE, JR.,

Proctors for Said Claimant.

Duly verified.

[Endorsed]: Filed July 16, 1958.

[Title of District Court and Cause.]

ANSWER AND EXCEPTIONS OF CLAIM-
ANT, ETHEL M. PLAYER, TO PETITION
OF UNITED STATES OF AMERICA FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY

Comes now, Ethel M. Player, the surviving spouse and sole heir at law of Albert N. Player, deceased, and makes and files herein her answer to the petition of United States of America on file herein and in said connection denies, admits and alleges as follows:

I.

Admits the allegations contained in Paragraphs I, II, III, IV, V, IX, X, XI, XII, XIII, XIV, XV, and XVII of said Petition.

II.

Answering paragraph VI of said petition, this claimant denies each and every, all and singular, generally and specifically, conjunctively and disjunctively, the allegations thereof; and in this connection claimant affirmatively alleges and avers that the explosion or explosions and fire aboard the Trojan January 29, 1957, and the resulting loss, damage and death to Albert N. Player, deceased, were solely and proximately caused by the joint and concurring negligence and fault of petitioner, United States of America, and Sheffield Tankers Corporation, as more particularly set forth in the verified claim of this claimant, served and filed

herein concurrently herewith, and claimant here refers to his said verified claim, and by said reference realleges all of the allegations in said verified claim contained, incorporates the same in and makes the same a part of this, claimant's answer to said petition, with the same force and legal effect as though said verified claim were herein set forth and repeated in full.

III.

Answering the allegations contained in paragraphs VII and VIII of said petition, claimant does not have sufficient information or belief to enable him to answer said paragraphs, and basing her answer thereto on her said lack of information or belief, denies each and every, all and singular, generally and specifically, conjunctively and disjunctively, said allegations; with the exception, however, that this claimant admits and alleges that petitioner, United States of America, at the time of and/or immediately after the said explosion and fire in the Trojan on January 29, 1957, had no interest whatsoever, either as owner or otherwise, in said Trojan or in any of her freight or consumable stores; and, in this connection, claimant further admits and alleges, that on January 29, 1957, said vessel Trojan was owned solely by and was in the possession and control of Sheffield Tankers Corporation. Further answering said paragraphs, claimant is informed and believes and therefore alleges that the value of said vessel Trojan on January 29, 1957, after said explosion or explosions

and fire, was the sum of approximately and not less than \$3,500,000.00.

IV.

Answering the allegations contained in paragraph XVI of said petition, this claimant alleges and avers that said petition of United States of America affirmatively shows on its face that petitioner was neither the owner of, nor the owner of any interest whatsoever in said steam tanker Trojan on January 29, 1957, at the time of said explosion or explosions and fire, and that in consequence petitioner has not brought itself within the provisions of the Act of March 3, 1851, entitled: "An Act to Limit the Liability of Shipowners and for other Purposes," as said Act has been since amended, supplemented, and/or implemented by the Rules of Practice in Admiralty and/or Maritime Cases of the Supreme Court, and/or the Rules of Practice of this Honorable Court governing proceedings in Admiralty.

V.

Answering the allegations and unsupported assertions contained in paragraph XVIII of said petition, claimant denies the truth of the allegations set forth in said petition, excepting only as hereinbefore admitted to be true, and claimant specifically denies that said allegations of said petition bring the same within the admiralty and/or maritime jurisdiction of the United States and/or of this Honorable Court; and, in this connection,

claimant alleges that the said allegations of said petition affirmatively show that this Honorable Court has no jurisdiction to entertain, hear, or to determine said petition for exoneration from or limitation of liability of petitioner, United States of America, with respect to said explosion or explosions and fire on January 29, 1957, upon and in said steam tanker Trojan; and this claimant hereby challenges said jurisdiction.

VI.

Further answering said petition, Claimant excepts thereto, and as and for his grounds of exception specifies:

1. That said petition fails to state facts sufficient to constitute any legal basis for said petition for exoneration from or limitation of liability, as said rights are found, defined and provided in the Act of March 3, 1851, entitled "An Act to Limit the Liability of Shipowners and for Other Purposes," 46 U. S. C. 183-189, as thereafter amended, supplemented or implemented by the Rules of Practice in Admiralty and Maritime Cases of the Supreme Court, and the rules of this Honorable Court governing proceedings in admiralty, and said petition affirmatively shows on its face that it is wholly insufficient.

2. That said petition shows on its face that this Honorable Court has no jurisdiction to entertain, hear, or to determine said petition, other than to dismiss the same for lack of jurisdiction.

Wherefore, having fully answered said petition, claimant, prays:

1. That said verified claim of this claimant, Ethel M. Player, concurrently served and filed herein, for the sum of \$150,000.00, be allowed in full against petitioner, United States of America; and

2. That said petition of United States of America for exoneration from or limitation of liability be dismissed without leave to amend, for lack of jurisdiction of this Honorable Court to entertain, hear or determine the same; and

3. For all costs and necessary disbursements heretofore or hereinafter necessarily incurred by said claimant herein; and

4. For such other and further relief as to the court may appear just and equitable in the premises.

/s/ PHILIP J. DOYLE,

/s/ WILBUR C. COLE, JR.,

Proctors for Claimant Ethel
M. Player.

Duly verified.

[Endorsed]: Filed July 16, 1958.

[Title of District Court and Cause.]

VERIFIED CLAIM OF EMMA E. GREEN, AS
ADMINISTRATRIX OF THE ESTATE OF
FRANK R. SOUZA, DECEASED

Comes Now, Emma E. Greene, as Administratrix of the Estate of Frank R. Souza, deceased, and herewith presents and files her verified claim and in these regards and premises sets forth the following:

I.

That she is the duly appointed Administratrix of the Estate of Frank R. Souza, deceased, by virtue of the orders and authority of the Superior Court in and for the City and County of San Francisco, State of California, and acting in said capacity.

II.

That Frank R. Souza, deceased, prior to his death, was a seaman, to wit: a third assistant engineer, in the service of the vessel the "S.S. Jeanny," now the "S.S. Trojan," which said vessel was allegedly purchased from an official agency of the United States of America by Sheffield Tankers Corporaiton, a corporation, or its predecessors in interest. Prior to said sale and purchase, the aforesaid vessel was in the control of the United States, its agents, servants and/or employees, and was inactive until approximately December, 1956, when said sale and purchase were effectuated. In this regard claimant is informed, believes and therefore alleges the United States was concurrently

with other named defendants, to wit: Sheffield Tankers Corporation and Todd Shipyard Corporation, negligent and careless, in that said vessel was at the time and place of transfer to the purchasers thereof in an unseaworthy condition.

III.

Said deceased was in the course and scope of his employment when the said vessel was undergoing repairs at the Todd Shipyards, owned, controlled and operated by the Todd Shipyards Corporation, a corporation, in Alameda, Alameda County, State of California, on or about the 29th day of January, 1957.

IV.

At the aforesaid date and place and at or about the hours of 3:00 p.m., and while said vessel was berthed at or about Pier 5, Todd Shipyards, aforesaid, the after section, aft housing, machinery sections, aft deep tanks and engine room were caused to and did explode violently thus proximately causing the said Frank R. Souza, deceased, to sustain multiple and devastating injuries and proximately and consequently killed him.

V.

The items of damage claimed herein are as follows:

(1) The sum of One Thousand, Three Hundred and Twelve Dollars and Thirty Cents (\$1,312.30) as and for the expense of the last rites and burial of said Frank R. Souza, deceased.

(2) The sum of Two Hundred Thousand Dollars (\$200,000) as and for general damages sustained by Enriqueta Souza, widow of said Frank R. Souza, deceased, who has been deprived of the services, earnings, support and companionship of said deceased.

Respectfully submitted,

/s/ EMMA E. GREENE,

As Administratrix of the Estate of Frank R. Souza, deceased.

Duly verified.

[Endorsed]: Filed July 16, 1958.

[Title of District Court and Cause.]

CLAIM OF SHEFFIELD TANKERS
CORPORATION

Sheffield Tankers Corporation makes this claim against the United States of America:

I.

Sheffield Tankers Corporation is a Delaware Corporation doing business as a ship owner.

II.

On April 22, 1955, United States of America took title to the steam tanker Trojan (ex Jeanny) under a Decree of Forfeiture rendered on that date by the United States District Court of the North-

ern District of California in the case of United States of America versus Tanker Jeanny, etc., Admiralty number 26366.

III.

On December 26, 1956, pursuant to a contract of sale dated as of December 21, 1956, United States of America sold and delivered the Steam Tanker Trojan (ex Jeanny) to Sheffield Tankers Corporation.

IV.

On January 29, 1957, while the Steam Tanker Trojan (ex Jeanny) was owned and operated by Sheffield Tankers Corporation and moored in the shipyard of Todd Shipyards Corporation of Alameda, California, an explosion or explosions and fire occurred on the Trojan.

V.

By reason of the aforesaid explosions or fire the Trojan was damaged. Members of the crew and employees of Todd and others were killed and injured and sustained loss of, or damage to property. The vessel was detained at great loss of profits and earnings to Sheffield. Extensive repairs were occasioned by the casualty. Much of the repair and reactivation already completed at the time of the casualty had to be redone.

VI.

The explosions and fire aboard the Trojan on January 29, 1957, and the resulting damage were

solely and proximately caused by the negligence and fault of the Todd Shipyards Corporation and/or United States of America, and their servants, agents and employees and others not now known to Sheffield Tankers Corporation and were not caused or contributed to by any act, omission, fault, negligence or breach of duty of Sheffield Tankers Corporation.

VII.

On April 12, 1957, Todd Shipyards Corporation filed an action in the United States District Court for the Northern District of California entitled Todd Shipyards Corporation versus The Steam Tanker Trojan (ex the Jeanny), her engines, machinery, boilers, boats, tackle, apparel, etc., and Sheffield Tankers Corporation, a corporation, seeking recovery of repair claims allegedly due in the sum of \$1,400,000.00.

VIII.

In addition, by reason of the foregoing the Trojan and Sheffield have been sued by employees of Todd and others for death and personal injuries in an aggregate amount in excess of \$1,400,000.00 and additional suits of the same, other and various natures will be commenced in amounts presently unascertained, as to which Sheffield will seek leave to amend its claim. Sheffield will be damaged to the extent it may be required to pay on account of said personal injuries and deaths and for the costs and expenses required in the defense of said claims. By reason of the premises any such damages, costs and expenses sustained or incurred by Sheffield, should

be borne by and are claimed against United States of America.

IX.

The explosion and fire aboard the Trojan on January 29, 1957, has resulted in many deaths and personal injuries and much property damage and demurrage and it may be and is expected that other claims will be made in suits filed against Sheffield Tankers Corporation as a result of the explosion and fire, in addition to the claim specifically referred to herein.

X.

If Sheffield Tankers Corporation is or becomes liable to anyone by reason of any matters arising out of the explosion and fire on board the Trojan on January 29, 1957, such liability was caused by the fault and negligence of the United States of America, its servants, agents and employees, among others, and United States of America is liable to Sheffield Tankers Corporation for any and all such liability by way of indemnity and contribution.

XI.

The amount of the claim of Sheffield Tankers Corporation against United States of America for indemnity and contribution is unknown at present and cannot be ascertained until full disposition of the pending and related actions and any further claims, libels, suits or actions that may be presented or filed against Sheffield Tankers Corporation.

XII.

These allegations are all true.

Wherefore, Sheffield Tankers Corporation asks that the Court decree payment by the United States of America to Sheffield Tankers Corporation of all its damages including any sum or sums that may be allowed or adjusted against Sheffield Tankers Corporation and any moneys this claimant may be called upon to pay to any other persons or parties for loss, damage, demurrage, injuries or deaths arising from the explosion and fire aboard the Trojan on January 29, 1957, together with interest thereon and costs and that claimant may have such other and further relief as may be just in the premises.

LILLICK, GEARY, WHEAT,
ADAMS & CHARLES,

/s/ GILBERT C. WHEAT,

/s/ EDWIN L. GEARHARDT,

/s/ MARK SCOTT HAMILTON

Proctors for Sheffield
Tankers Corporation.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 17, 1958.

[Title of District Court and Cause.]

ANSWER OF SHEFFIELD
TANKERS CORPORATION

Sheffield Tankers Corporation, answers the Petition of the United States of America for Exoneration from or Limitation of Liability as follows:

I.

Admits the allegations of Article I.

II.

Admits the allegations of Article II.

III.

Admits the allegations of Article III.

IV.

Admits the allegations of Article IV.

V.

Admits the allegations of Article V.

VI.

Denies the allegations of Article VI, except is informed and accordingly believes and therefore admits that the explosion and fire aboard the Trojan on January 29, 1957, and the resulting loss, damage and injury were proximately contributed to by the negligence and fault of Todd Shipyards Corporation, their servants, agents and employees.

VII.

Denies the allegations of Article VII, except admits that at the time of the explosion and fire aboard the Trojan on January 29, 1957, United States of America did not have the custody or control of the vessel and no servants, agents or employees of it were known to respondent to have been on or about the vessel or participating in any activities with reference to her repairs.

VIII.

Denies the allegations of Article VIII.

IX.

Admits the allegations of Article IX.

X.

Admits the allegations of Article X.

XI.

Admits the allegations of Article XI.

XII.

Admits the allegations of Article XII.

XIII.

Admits the allegations of Article XIII.

XIV.

Admits the allegations of Article XIV.

XV.

Has no information to answer the allegations contained in Article XV and on that ground denies the same.

XVI.

Denies the allegations of Article XVI and further denies that United States of America is entitled to have its liability limited.

XVII.

The allegations contained in Article XVII raise questions of law only which do not require answer.

XVIII.

Denies the allegations of Article XVIII, except admits the Court has jurisdiction of the matter.

Wherefore, Sheffield Tankers Corporation ask that the Petition of the United States of America be denied and a decree entered for the allowance of the claim of Sheffield Tankers Corporation on file herein and for such other relief as may be just in the premises.

LILLICK, GEARY, WHEAT,
ADAMS & CHARLES,

/s/ GILBERT C. WHEAT,

/s/ EDWIN L. GERHARDT,

/s/ MARK SCOTT HAMILTON,

Proctors for Sheffield
Tankers Corporation.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 17, 1958.

[Title of District Court and Cause.]

CLAIM FOR DAMAGES

Comes now Stanley B. Murphy and makes claim and proof of claim herein against United States of America, as owner of the Tanker Trojan (ex Jeanny), and for First cause of claim alleges:

I.

That Petitioner is and at all times mentioned herein was a sovereign nation.

II.

That Petitioner herein is now and was at all times herein mentioned the owner of the Tanker Trojan (ex Jeanny).

III.

That on or about the 29th day of January, 1957, Claimant was in the employ of the Westinghouse Electric Corporation, and that on said date Claimant was engaged in work on board the Tanker Trojan for and under the direction of Todd Shipyards Corporation and Petitioner United States of America, as Owner of the Tanker Trojan; that said Claimant was performing said work pursuant to a contract for repairs to said vessel by the Todd Shipyards Corporation and Petitioner, and each of them; that then and there and by reason thereof Claimant was a business visitor of the Petitioner and said vessel, and that Claimant was then and

there actually working aboard said ship and making repairs thereto and was rendering services necessary to the ship's business of carrying cargo, and in doing so was doing ship's work and work usually performed by a seaman in the service of said vessel.

IV.

That while Claimant was working aboard said Tanker Trojan, as aforesaid, and while under and pursuant to the directions and instruction of said vessel's operating Petitioner an explosion occurred aboard the vessel with great force, inflicting upon Claimant serious personal injuries.

V.

That said explosion occurred as a proximate result of the negligence of Petitioner, its agents, employees and the owners, masters and crew of said vessel in, among other things, that the boilers in the engine room of said vessel were fired up and operated without due precaution and by reason of other acts of negligence by Petitioner and Petitioner's personnel, the nature of which Claimant has not yet ascertained, and Petitioner prays leave to specify the nature of said negligent acts when specifically ascertained; that Petitioner knew, or in the exercise of reasonable care should have known of the dangerous and defective condition of said vessel, its appurtenances, equipment, fuel tanks and all the associated equipment appurtenant thereto, and failed to remedy, take necessary precautions

or warn Claimant, and others, against the same; that by reason thereof Petitioner thereby negligently failed to provide Claimant with a reasonably safe place to work.

VI.

That as a direct and proximate result of Petitioner's negligence, as herein alleged, Claimant received serious and painful injuries to his head, body and limbs; that the full extent of such injuries has not yet been ascertained, but Claimant is informed and believes that the injuries are permanent in nature; that as a direct result of the foregoing injuries, so caused as aforesaid, Claimant has been damaged in the sum of Thirty-five Thousand Dollars (\$35,000.00).

VII.

That as a proximate result of Petitioner's negligence, as aforesaid, and the resultant alleged injuries Claimant has incurred and may in the future incur expenses for hospitalization, services of physicians and surgeons, medicines and kindred items; that in addition Claimant has incurred loss of wages by reason of said injuries in an amount not yet ascertained, and therefore prays leave to amend this Claim to insert the full amount of said medical expenses and wage loss when ascertained.

VIII.

That the nature, grounds and items of this claim and the allegations of fact upon which Claimant

relies are set forth herein, and no credits have been given or payments made; that the allegations herein are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore, Claimant prays judgment as hereinafter prayed.

For a Second cause of claim Claimant alleges:

I.

Claimant hereby incorporates and makes a part of this cause of claim all of the allegations contained in the First cause of claim contained herein, as fully and completely as if said allegations were set out herein in the words and figures therein contained.

II.

Upon information and belief said Claimant alleges that said explosion occurred by reason, among other things, of the defective, unsafe and unseaworthy condition of said vessel, Tanker Trojan; that the injuries of Claimant were directly and proximately caused by and resulted from Petitioner's failure to provide Claimant with a safe and seaworthy vessel.

Wherefore, Claimant presents his claim herein in the sum of Thirty-five Thousand Dollars (\$35,000.00), and interest, and for reasonable medical expenses and loss of wages when ascertained, and

for such other and proper relief as is meet in the premises.

HAGAR, CROSBY & ROSSON,

/s/ DAVID C. RUST,

Proctors for Claimant,
Stanley B. Murphy.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 18, 1958.

[Title of District Court and Cause.]

ANSWER OF STANLEY B. MURPHY

Comes now Claimant and in answer to the Petition on file herein by United States of America, as Owner of the Tanker Trojan, for exoneration from or Limitation of Liability, admits, denies and alleges:

I.

Answering paragraph IV of said Petition the Claimant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the averments therein and upon this ground denies the allegations therein contained.

II.

Answering paragraph V of said Petition the Claimant denies the allegations that the repairs to

said vessel were being done on behalf of Sheffield Tankers Corporation alone, but alleges that said repairs were also being done on behalf of Petitioner.

III.

Answering paragraphs VI and VII of said Petition the Claimant denies generally and specifically, each and every, both singularly and generally, the allegations contained in said paragraphs VI and VII of said Petition.

IV.

Answering paragraph VIII of said Petition, the claimant denies generally and specifically, each and every, both singularly and generally, the allegations therein contained, and further specifically denies on the grounds that he is without knowledge or information sufficient to form a belief as to the truth of the averment therein, the value of said vessel and interest of Petitioner therein, and requires strict proof thereof.

V.

Answering paragraph XVI of said Petition, the Claimant denies the allegations therein, and alleges that Petitioner and the Tanker Trojan are liable for all loss, damage and injury resulting from the aforesaid explosion, and Claimant further denies that Petitioner is entitled to statutory limitations of liability under Title 46, U.S.C., Sections 181-186, or under any other applicable sections of the Laws and Acts of the Congress of the United States.

Wherefore, Claimant prays that Petitioner's Petition for Exoneration from or Limitation of Liability be denied.

HAGAR, CROSBY & ROSSON,

/s/ DAVID C. RUST,

Proctors for Claimant,
Stanley B. Murphy.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 18, 1958.

[Title of District Court and Cause.]

DECREE OF DEFAULT

It Appearing to this Court that pursuant to its order entered in the above-entitled proceedings on May 2, 1958, a Monition was duly issued herein out of and under the seal of this Court, directed to the United States Marshal of this District and commanding him to cite all persons, firms, corporations, and parties claiming damages from or against petitioner or its agents, to file their claims under oath with the Clerk of this Court and serve on or mail to Petitioner's proctors, Lloyd H. Burke, Esq., United States Attorney; Keith R. Ferguson, Esq., Special Assistant to the Attorney General, and Graydon S. Staring, Esq., Attorney, Admiralty and Shipping Section, Department of

Justice, Rm. 447-A, Post Office Building, Seventh and Mission Streets, San Francisco 1, California, a copy thereof on or before the 17th day of June, 1958, or be defaulted, and to cite any claimants desiring to contest Petitioner's right to exoneration from or limitation of liability, to file an answer to the petition and serve a copy thereof on proctors for Petitioner; and

It Further Appearing to the satisfaction of the Court that the Marshal has in all respects complied with the Restraining Order of this Court and Order for Issuance of Monition, dated May 2, 1958, and with the Monition, and that he has cited and admonished in the manner prescribed therein all persons, firms, corporations and parties; and

It Further Appearing that the United States Marshal did cause public notice of the monition to be given in accordance with and in the form prescribed by this Court, and by United States Supreme Court Admiralty Rule 51, by publication in The Recorder, a daily newspaper of general circulation printed and published in the City and County of San Francisco, State of California, as more fully appears from the Marshal's return on file herein; and that copies of Supreme Court Admiralty Rule No. 52, copies of the Notice of Petition for Exoneration from or Limitation of Liability, copies of the Restraining Order and Order for Issuance of Monition were on May 8, 1958, prior to the day of second publication of Notice,

mailed to the persons set forth in the Affidavit of Mailing on file herein; and

It Further Appearing that all matters and things required to be done pursuant to the Restraining Order and Order Directing Issuance of Monition, dated May 2, 1958, and the Monition, have been done and performed; and

It Further Appearing that on the return date of the Monition, June 17, 1958, proclamation was duly made in open court, and that upon the making of said proclamation, at the request of Petitioner, this court ordered that all persons, firms, corporations, and parties claiming damages from or against Petitioner, or its agents, have to and including the 16th day of July, 1958, within which to file their claims and answers to the petition under oath with the Clerk of this Court, and serve on or mail to proctors for Petitioner, Lloyd H. Burke, Esq., United States Attorney; Keith R. Ferguson, Esq., Special Assistant to the Attorney General, and Graydon S. Staring, Esq., Attorney, Admiralty and Shipping Section, Department of Justice, Room 447-A, Post Office Building, Seventh and Mission Streets, San Francisco 1, California, a copy thereof; and

It Further Appearing that no claim or claims have been filed in these proceedings by any persons, firms or corporations pursuant to the Monition and Notice thereof, or any answers to the petition served or filed herein; or extensions of time

granted to file claims or answers herein, except as is shown by the records and files of the Clerk of this Court in this cause, and by the list of claimants who have filed claims and those who have obtained an extension of time to file claims, hereto attached and made a part hereof; and the Court being fully advised in the premises,

Now, Therefore, upon motion of proctors for Petitioner,

It Is Hereby Ordered, Adjudged and Decreed that the default be and the same is hereby entered of all persons, firms, corporations and parties except those who have heretofore on or before the date of this decree filed claims or claims and answers to the petition, or obtained an order extending time to file claims or answers in these proceedings, as shown by the records and files of the Clerk of this Court in this cause, and by the list of claimants and those who have obtained extension of time to file claims hereto attached and made a part hereof, having any interest in or in any way claiming any interest in and having claims for damages from or against Petitioner for any loss, damage, injury, death or destruction of any kind, resulting from the explosion or explosions and fire aboard the steam tanker Trojan, on January 29, 1957, in the shipyard of Todd Shipyards Corporation at Alameda, California, who have failed to file their claims herein or obtain such order extending time on or before the date of this decree; and

It Is Further Ordered, Adjudged and Decreed that no liability exists upon the part of Petitioner herein to any persons, firms, corporations, and parties for any damages from or against Petitioner for any loss, damage, injury, death or destruction of any kind, resulting from the explosion or explosions and fire aboard the steam tanker Trojan, on January 29, 1957, in the shipyard of Todd Shipyards Corporation at Alameda, California, who have not filed claim for any such loss, damage, destruction of any kind, or injury, including death and personal injuries, and who, intending to contest the right to exoneration or limitation, have not answered or pleaded to the petition on or before the date of this decree, and who are not shown by the files of the Clerk of this Court or the list hereto attached as having filed a claim or obtained an order extending time within which to file a claim, and all such persons, firms, corporations and parties, except those referred to as having filed claim or obtained an order extending time to file the same, are hereby barred from any participation in this proceeding or in any fund arising out of this proceeding; and

It Is Further Ordered, Adjudged and Decreed that all persons, firms, corporations and parties who are herein defaulted, be and they, and each of them, are hereby perpetually restrained and enjoined from commencing or prosecuting any action or suit for any loss, damage, injury, death, or destruction of any kind, whether of or to life or per-

sons or property, resulting from the explosion or explosions and fire aboard the steam tanker Trojan, on January 29, 1957, in the shipyard of Todd Shipyards Corporation at Alameda, California, against the Petitioner in any Court; and

It Is Further Ordered, Adjudged and Decreed that all issues raised by the petition herein and answers thereto now on file, or any answer or answers which may hereafter be filed within the time granted by this Court, shall stand for trial before this Court according to the rules and practice thereof; and

It Is Further Ordered, Adjudged and Decreed that the proof of all claims so filed as aforesaid be and the same is hereby suspended until the trial and determination of this action.

Dated: July 21st, 1958.

/s/ GEORGE B. HARRIS,
United States District Judge.

Extend in Admiralty.

Docketed on July 22, 1958.

Date Filed	Name of Claimant	Proctor	Amount Claimed
6/12/58	Todd Shipyards Corporation	McCutchen, Thomas, Matthew, Griffiths & Greene; Crowell, Rouse & Varian.....	\$ 8,100,000.00
6/16/58	Marion Gainey (Robert P. Gainey, dec'd)	Hoberg & Finger; Joseph E. Tinney & Ellis Filene	100,000.00
6/16/58	Charles Cecil McNaughton	Barrett, Lucy & Harkleroad, Dudley Harkleroad	50,000.00
6/16/58	Patricia Gauthier, Rosemary Gauthier, Mae Wilda Gauthier, Herbert J. Gauthier, Jr., Jean Evelyn Gauthier, Albert Jeffery Gauthier, Victor Anthony Gauthier, Rene Michelle Gauthier, minors, by and through Olive Bernice Gauthier, guardian ad litem of each, and Olive Bernice Gauthier, individually, and Barbara Anna Langley and Helen Louise Thompson (Herbert J. Gauthier, Sr., dec'd)	James C. Purecell, Edwin V. McKenzie, Michael Riordan, James C. Purecell, D. Ralph Cesari..... Kenneth W. Larson.....	550,000.00 50,000.00
6/17/58	George Hinkley	Jay T. Cooper; Dorr, Copper & Hays.....	182,851.34
6/17/58	Travelers Insurance Company		

Date Filed	Name of Claimant	Proctor	Amount Claimed
7/11/58	Melvin Gladstone, Admr. of Estate of Max J. Gladstone, dec'd.	McMurray, Brotsky, Walker, Baneroft, & Tepper;	
7/15/58	James M. Archie	Allan Brotsky	\$ 100,575.00
7/15/58	Frank Tucker	Crozier C. Culp, Rodney G. Commons.....	150,000.00
7/15/58	Kee Welch	Stanley M. Fernwood	50,000.00
7/15/58	Ulrich Kale	Stanley M. Fernwood	50,000.00
7/15/58	Abram Bittle	Stanley M. Fernwood	50,000.00
7/15/58	Robert Wilcox	Stanley M. Fernwood	50,000.00
7/15/58	Clovis Campbell	Stanley M. Fernwood	50,000.00
7/16/58	Eugene Fitch	Smith & Parrish, Joseph E. Smith.....	50,000.00
7/16/58	Wilfred J. Molden	Smith & Parrish, Joseph E. Smith.....	25,000.00
7/16/58	Kurt C. Kahlert	Smith & Parrish, Joseph E. Smith.....	100,000.00
7/16/58	Theodore Moore	Smith & Parrish, Joseph E. Smith.....	25,000.00
7/16/58	Milton Fairfax Johnson	Smith & Parrish, Joseph E. Smith.....	25,000.00
7/16/58	Henry C. Frison	Edises, Treuhaft, Grossman & Grogan; Robert E. Treuhaft	25,000.00
7/16/58	Rubin May, Jr.	Edises, Treuhaft, Grossman & Grogan; Robert E. Treuhaft	30,000.00
			150,000.00

7/16/58	Samuel Roberts	George L. Cooke, Andrew Bodisco.....	\$ 25,000.00
7/16/58	Theodore Carpenter	George L. Cooke, Andrew Bodisco.....	25,000.00
7/16/58	Charles Ballew	George L. Cooke, Andrew Bodisco.....	75,000.00
7/16/58	Weldon Cochran	George L. Cooke, Andrew Bodisco.....	75,000.00
7/16/58	Allie Evans	George L. Cooke, Andrew Bodisco.....	100,000.00
7/16/58	Marion E. Oldham	Kaiser & O'Neill, Jeremiah F. O'Neill, Jr.....	75,000.00
7/16/58	Ethel M. Player (Albert N. Player, dec'd)	Philip J. Doyle.....	150,000.00
7/16/58	Nellie Stanovich, individually, and as Spec. Admx. of Estate of Pete Stanovich, dec'd	Guidotti & Mellana, Aldo P. Guidotti.....	101,367.58
7/16/58	Bertha Mae McIntyre as Spec. Admx. of Estate of Roosevelt McIntyre	Darwin & Peckham, Jay A. Darwin.....	400,000.00
7/16/58	John E. Polk	Darwin & Peckham, Jay A. Darwin.....	300,000.00
7/16/58	Oscar F. Asplin, Jr.	Darwin & Peckham, Jay A. Darwin.....	100,000.00
7/16/58	John H. Allison	Darwin & Peckham, Jay A. Darwin.....	70,000.00
7/16/58	Rudy F. Bohme	Darwin & Peckham, Jay A. Darwin.....	70,000.00
7/16/58	Philip J. Brissell	Darwin & Peckham, Jay A. Darwin.....	100,000.00

Date Filed	Name of Claimant	Proctor	Amount Claimed
7/16/58	John J. Casey	Darwin & Peckham, Jay A. Darwin	\$ 70,000.00
7/16/58	Eddie Cobb	Darwin & Peckham, Jay A. Darwin	70,000.00
7/16/58	Sievert C. Hansen	Darwin & Peckham, Jay A. Darwin	70,000.00
7/16/58	Willie D. Howard	Darwin & Peckham, Jay A. Darwin	70,000.00
7/16/58	Carl K. Larsen	Darwin & Peckham, Jay A. Darwin	100,000.00
7/16/58	James L. Lewis	Darwin & Peckham, Jay A. Darwin	40,000.00
7/16/58	James C. Prater	Darwin & Peckham, Jay A. Darwin	100,000.00
7/16/58	Billie B. Rawson	Darwin & Peckham, Jay A. Darwin	200,000.00
7/16/58	Alfred E. Stief	Darwin & Peckham, Jay A. Darwin	70,000.00
7/16/58	Willie Wise	Darwin & Peckham, Jay A. Darwin	200,000.00
7/16/58	Moses Rogers	Melvin M. Belli & Herbert Resner	100,000.00
7/16/58	Thomas Chapman	Melvin M. Belli & Herbert Resner	50,000.00
7/16/58	John Hines	Melvin M. Belli & Herbert Resner	35,000.00
7/16/58	James Coleman	Melvin M. Belli & Herbert Resner	50,000.00
7/16/58	R. H. Hawthorne	Melvin M. Belli & Herbert Resner	35,000.00

7/16/58	Lee Kilpatrick	Melvin M. Belli & Herbert Resner.....	75,000.00
7/16/58	Chester R. Smith	Melvin M. Belli & Herbert Resner.....	
7/16/58	Elmira Terry McIntyre (Roosevelt McIntyre, dec'd)	Melvin M. Belli & Herbert Resner.....	100,000.00
7/16/58	Emma E. Greene Admx. of Estate of Frank R. Souza, dec'd.	Ashe & Pinney.....	201,312.30
7/17/58	Sheffield Tankers Corporation	Lillick, Geary, Wheat, Adams & Charles; Gilbert C. Wheat, Edwin L. Gerhart, Mark Scott Hamilton....	2,800,000.00
7/18/58	Stanley B. Murphy	Hagar, Crosby & Rosson; David C. Rust.....	35,000.00

Claimants Who Were Granted Extensions of Time Within Which to File Claims

Philip Steiner

7/16/58 Clark M. Truex

[Endorsed]: Filed July 21, 1958.

[Title of District Court and Cause.]

CLAIM OF CLARK M. TRUEX PURSUANT
TO ADMIRALTY RULE 52, UNITED
STATES SUPREME COURT

To the Honorable, the Judges of the District Court
of the United States for the Northern District
of California, Southern Division:

The claim of Clark M. Truex respectfully shows:

I.

Claimant is a resident of Alameda County, State
of California.

II.

Claimant is a shipyard worker who was on January 29, 1957, in the employ of Todd Shipyards, Inc., aboard the Tanker, Trojan (ex Jenny), in Alameda County, California. At said time and place the tanker Trojan (ex Jenny) was docked at a wharf or pier in said shipyard, and afloat on navigable waters of the United States, to wit, San Francisco Bay.

III.

At said time and place a severe explosion occurred aboard said vessel which was caused by the negligence and unseaworthiness of said vessel, her owners and operators, Sheffield Tankers Corporation and the United States of America.

IV.

Claimant Clark M. Truex was seriously injured as a direct and proximate result of the aforesaid

fire and explosion as follows: Certain major dangerous, painful and permanently crippling and disabling injuries to his body, including, among other things, burns of and about the face and hands, and injuries to the face, head, eyes and ears, requiring plastic surgery, loss of eyesight and headaches, injury and major shock to claimant's nervous system, hernia, and other injuries and financial loss not presently ascertained by claimant which may grow out of the aforesaid injuries, and claimant has been and will be in the future deprived and prevented thereby from following his usual occupation as a marine electrician, all to claimant's damage in the sum of fifty thousand dollars (\$50,000.00).

Wherefore, claimant Clark M. Truex hereby asserts his claim and prays judgment and decree against petitioner in the amount of fifty thousand dollars (\$50,000.00), his costs of suit, and such other and further relief as to the Court seems appropriate in the premises.

/s/ PHILIP STEINER,
Proctor for Claimant,
Clark M. Truex.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 23, 1958.

[Title of District Court and Cause.]

CROSS-LIBEL

To the Honorable the Judges of the United States
District Court for the Northern District of
California, Sitting in Admiralty:

The cross-libel of the United States of America, petitioner, against claimant Todd Shipyards Corporation in a cause of contract and damage, civil and maritime, respectfully shows as follows:

I.

Cross-libelant is and at all times mentioned herein was a sovereign nation.

II.

At all times hereinafter mentioned, cross-respondent Todd Shipyards Corporation, was and now is a corporation organized and existing under the laws of the State of New York, having a principal place of business in the City of Alameda, State of California, within the jurisdiction of this Honorable Court.

III.

The steam tanker Trojan (ex Jeanny) is, and was at all material times, a steel, ocean-going T2 tanker of 10,296 gross tons, registered under the laws of the United States, Official No. 247177.

IV.

On December 20, 1957, Todd Shipyards Corporation, as cross-respondent, filed, in that certain ac-

tion in the United States District Court for the Northern District of California, entitled *Todd Shipyards Corporation vs. the Steam Tanker Trojan*, Admiralty No. 27506, an impleading petition against the United States of America, alleging that Todd Shipyards Corporation was damaged by the explosion and fire aboard the *Trojan*, January 29, 1957, in an unspecified amount dependent upon claims made against Todd Shipyards Corporation and claiming the recovery of all such damages from the United States of America, on the basis of alleged acts and failures to act of Petitioner as owner of the *Trojan* (ex *Jeanny*). Pursuant to an order of consolidation, dated April 28, 1958, the said action, Admiralty No. 27506, was consolidated with, and under the caption of, that certain action in the United States District Court for the Northern District of California entitled *In the Matter of the Petition of Sheffield Tankers Corporation, etc.*, Admiralty No. 27543.

V.

On April 8, 1958, Todd Shipyards Corporation, as libelant, filed, in that certain action in the United States District Court for the Northern District of California, entitled *Todd Shipyards Corporation vs. United States of America*, Admiralty No. 27702, a libel against the United States of America, alleging that Todd Shipyards Corporation was damaged by the explosion and fire aboard the *Trojan*, January 29, 1957, in an amount in excess of \$8,000,000.00, and claiming the recovery of all such damages from the United States of America, on the

basis of alleged acts and failures to act of Petitioner as owner of the Trojan (ex Jeanny).

VI.

On April 8, 1958, Todd Shipyards Corporation, as plaintiff, filed, in that certain action in the United States District Court for the Northern District of California, entitled Todd Shipyards Corporation vs. United States of America, civil No. 37181, a complaint against the United States of America alleging that Todd Shipyards Corporation was damaged by the explosion and fire aboard the Trojan, January 29, 1957, in an amount in excess of \$8,000,000.00, and claiming the recovery of all such damages from the United States of America, on the basis of alleged acts and failures to act of Petitioner as owner of the Trojan (ex Jeanny).

VII.

On May 2, 1958, cross-libelant United States of America filed, in this present action, its petition for exoneration from or limitation of liability, and numerous claimants, including cross-respondent Todd Shipyards Corporation, have filed their claims therein. The names of such claimants and the nature of their claims are shown by the record in this action.

VIII.

On April 22, 1955, cross-libelant took title to the Steam Tanker Trojan (ex Jeanny) under a certain decree of forfeiture passed on that date by the United States District Court for the Northern Dis-

trict of California, in the case of the United States of America vs. Tanker Jeanny, etc., Admiralty No. 26366, and thereafter and until on or about December 26, 1956, the Trojan was owned by petitioner and, except for preparation of the vessel for lay-up, was berthed as a dead ship in the Suisun Bay Reserve Fleet of the United States Maritime Administration.

IX.

Prior to May 16, 1955, cross-respondent entered into a written contract, designated Contract No. MA-293, with cross-libelant United States of America, which said contract was at all material times and now is in full force and effect, the obligations and liabilities of which contract have been duly assumed by cross-respondent. The terms and conditions of the said contract, a copy of which is in the possession of cross-respondent, and a copy of which will be produced at the trial, are hereby made a part hereof by reference as though fully set forth herein. By the terms of the said contract, cross-respondent agreed to perform from time to time repair, alteration, conversion, reconversion or reconditioning of vessels of the United States under job orders issued by the Maritime Administration.

X.

On May 16, 1955, under the said Contract MA-293, the United States issued to cross-respondent Job Order No. 51. The terms and conditions of the said job order, a copy of which is in the possession of cross-respondent, and a copy of which will be

produced at the trial, are hereby made a part hereof by reference as though fully set forth herein. Cross-respondent accepted the said job order and undertook and became obligated thereunder, and under the terms and conditions of Contract MA-293, to perform certain repairs and maintenance including necessary repairs and maintenance to prepare the Trojan (ex Jeanny) for purposes of lay-up and, for the purpose of performing such repairs and maintenance, to take exclusive custody, control and operation of the said ship.

XI.

On May 20, 1955, under the said Contract MA-293, the United States issued to cross-respondent Job Order No. 51A. The terms and conditions of the said job order, a copy of which is in the possession of cross-respondent and a copy of which will be produced at the trial, are hereby made a part hereof by reference as though fully set forth herein. Cross-respondent accepted the said job order and undertook and became obligated thereunder and under the terms and conditions of Contract MA-293 to perform certain additional repairs and maintenance including specifically the performance of the following:

“Furnish additional labor and materials as necessary to thoroughly clean oil found in main cargo and stripping lines. Thoroughly clean and dispose of oil from No. 9 center cargo tank as a result of stripping to accomplish above work.”

XII.

During the time when cross-respondent was engaged in performing work aboard the Trojan (ex Jeanny) and in furnishing labor, services, materials, equipment, supplies and facilities incident thereto pursuant to and under the terms of the said contract and the said job orders, the vessel and all portions of the vessel, were in the sole and exclusive custody and control of cross-respondent, its servants, agents and employees under the said contract and the said job orders for the purpose of performing necessary repairs and maintenance to prepare the vessel for lay-up purposes.

XIII.

On December 26, 1956, pursuant to a certain contract of sale dated as of December 21, 1956, cross-libelant sold and delivered the Steam Tanker Trojan (ex Jeanny) to Rotary Tankers Corporation, a Delaware corporation, which has since changed its name and is now known as Sheffield Tankers Corporation, and will hereafter be so referred to.

XIV.

On or about January 4, 1957, the Trojan, then named the Jeanny, was moved to Todd Shipyards, Alameda, California, for extensive reactivation repairs on behalf of Sheffield Tankers Corporation, and on January 29, 1957, at approximately 3:10 p.m., while she was moored afloat at a Todd Shipyard pier, undergoing repair, the explosion or explosions occurred within the after portion of the

vessel followed by fire, which resulted in many deaths and personal injuries and much property damage, and which are referred to in the pleadings now on file herein.

XV.

The explosion or explosions and fire aboard the Trojan January 29, 1957, and the resulting loss, damage and injury were not caused or contributed to by any act, omission, fault, negligence or breach of duty of cross-libelant, but were solely and directly and proximately caused by the carelessness and negligence of cross-respondent, its servants, agents and employees, and by their wilful misconduct, failure to exercise good faith, and failure to perform the terms and conditions of the said contract in that cross-respondent failed to perform its work according to the best commercial marine practice and in compliance with the requirements of the American Bureau of Shipping, the United States Coast Guard, and other regulatory bodies, in failing to perform the work as specified above, and in other respects which will be proved at the trial, and by the improper, careless and negligent manner in which cross-respondent, its servants, agents and employees conducted themselves and their activities and misused the facilities aboard the said vessel.

XVI.

If cross-libelant is under any liability by reason of any of the matters alleged in the petition, libel, complaint and claims referred to in Articles IV, V, VI and VII above, or otherwise, such liability

was solely and proximately caused by the fault, negligence and breach of contract of cross-respondent, its servants, agents and employees, as alleged herein; and by reason thereof, any and all such liability should be borne by cross-respondent and cross-respondent is wholly liable to cross-libelant by way of full indemnity over.

XVII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

For a Second and Separate Cause of Action Cross-Libelant Alleges as Follows:

XVIII.

Cross-libelant refers to and incorporates as though fully set forth herein all the allegations of Articles I, II, III, IV, V, VI, VII, VIII, XIII, XIV, XVI and XVII above.

XIX.

The explosion or explosions and fire aboard the Trojan January 29, 1957, and the resulting loss, damage and injury were not caused or contributed to by any act, omission, fault, negligence or breach of duty of cross-libelant but were solely and proximately caused by the carelessness and negligence of cross-respondent, its servants, agents and employees in connection with the performance of the said reactivation repairs on behalf of Sheffield Tankers Corporation, while the vessel was in the

possession, custody and control of cross-respondent, in that cross-respondent performed the said repairs in an unsafe, improper and unworkmanlike manner in the following respects, among others, which will be proved at the trial:

1. Cross-respondent failed to maintain an adequate fire watch.

2. Cross-respondent opened a bunker tank and maintained it or suffered it to remain in an open condition with heat applied to the oil therein and work, including hot work proceeding in the vicinity of the tank and its openings.

3. Cross-respondent performed hot work, including electric arc welding in the vicinity of an open bunker tank containing oil which cross-respondent knew, or in the exercise of reasonable care, ought to have known, was being heated.

4. Cross-respondent failed and neglected to test or inspect the condition with respect to its explosive or inflammable characteristics of oil and gases in an open bunker tank near where cross-respondent was performing hot work, or, having made such tests or inspections, ignored the results thereof.

Wherefore, cross-libelant prays that cross-respondent be required to appear and answer all and singular the matters set forth herein and that, if the Court shall find that any party is entitled to a decree for damages against cross-libelant United States of America, then that cross-libelant have a decree, with costs, against cross-respondent for all

damages and costs awarded against cross-libelant and that cross-libelant may have such other and further relief and redress as to the Court may seem just.

LLOYD H. BURKE,

United States Attorney;

/s/ KEITH R. FERGUSON,

Special Assistant to the
Attorney General;

/s/ GRAYDON S. STARING,

Attorney, Admiralty and Shipping Section, Department of Justice, Proctors for Petitioner
United States of America.

Duly verified.

[Endorsed]: Filed August 6, 1958.

[Title of District Court and Cause.]

NOTICE OF MOTION OF TODD SHIPYARDS
CORPORATION TO DISMISS PETITION
FOR LIMITATION OF LIABILITY

To: United States of America, Petitioner above-named, and to Robert H. Schnacke, United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General, and Graydon S. Staring, Attorney, Admiralty and Shipping Section of the Department of Justice, its proctors and to all claimants in the above-en-

titled proceedings and to their respective proctors:

Please Take Notice That on Monday, September 29, 1958, at 9:30 o'clock in the morning or as soon thereafter as counsel may be heard in the courtroom of the above-entitled court at the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, claimant Todd Shipyards Corporation will move the court (1) to dismiss the petition of the United States of America for exoneration from or limitation of liability; (2) to dissolve, set aside and vacate the Restraining Order and Order Directing Issuance of Monition, dated and filed May 2, 1958, and (3) to order that all testimony taken by deposition in this proceeding or in the consolidated proceeding entitled, In the Matter of the Petition of Sheffield Tankers Corporation, No. 27543, in Admiralty, subsequent to the issuance of the said restraining order shall be deemed to have been taken in the said proceeding No. 27543, and in the suits of Todd Shipyards Corporation vs. United States of America, No. 27702 (Admiralty) and No. 37181 (Civil), and not subject to any infirmities by reason of the existence of the said restraining order.

The said motion will be made upon the ground that the liability in respect to which petitioner seeks limitation of liability is not a liability which falls within the policy and purview of the Acts of Congress limiting the liability of shipowners and the court does not have jurisdiction of the said peti-

tion. Said motion will be based upon the pleadings, files and records herein.

Dated: September 16, 1958.

/s/ RUSSELL A. MACKEY,

/s/ BRYANT K. ZIMMERMAN,

/s/ McCUTCHEN, DOYLE,
BROWN & ENERSEN,

/s/ CROWELL, ROUSE &
VARIAN,

Proctors for Claimant, Todd
Shipyards Corporation.

[Endorsed]: Filed September 16, 1958.

In the United States District Court for the North-
ern District of California, Southern Division

In Admiralty—No. 27721

In Re TROJAN, on the Petition of the UNITED
STATES OF AMERICA, as Owner, for Ex-
oneration From or Limitation of Liability.

ORDER DENYING MOTION TO DISMISS PE-
TITION FOR EXONERATION FROM OR
LIMITATION OF LIABILITY

Todd Shipyards Corporation (hereinafter called
“Todd”) moves to dismiss the United States, peti-
tion for limitation of liability. The pertinent facts
may be summarized as follows:

On April 22, 1955, the United States acquired title by decree of forfeiture to the steam tanker Trojan (at that time called Jeanny). Shortly thereafter, pursuant to written contract with the United States, at its Alameda shipyard Todd prepared the Trojan for berth as a dead ship in the Suisun Reserve Fleet of the United States Maritime Administration. On completion of this work, the Trojan was placed and remained berthed in the Reserve Fleet at Suisun until December 26, 1956, when pursuant to a written contract of sale, the United States delivered the Trojan to Sheffield Tankers Corporation (at that time known as Rotary Tankers Corporation). Early in January, 1957, the new owner, Sheffield, delivered the vessel to Todd's Alameda yard for extensive reactivation repairs. On the afternoon of January 29, 1957, while the Trojan was moored afloat at Todd's pier, the after portion of the vessel was rocked by explosion which was followed by fire. Extensive damage was done to the vessel and approximately 52 persons were killed or injured.

Prior to the filing of this petition by the United States, Todd commenced a libel in this Court (Admiralty Number 27702) against the United States. This libel alleged, inter alia, that at the time of and in addition to the sale of the Trojan to Sheffield, the United States separately sold a quantity of oil located in the Trojan's port and starboard after bunker tanks. This oil, according to Todd's libel, was expressly or impliedly represented by the

United States to be of the character commonly known as "Bunker C fuel oil." Todd's libel further alleges the fluid in the bunker tanks referred to was not in fact Bunker C fuel oil, but rather an admixture of highly volatile, inflammable, explosive, and inherently dangerous matter; further, that the United States knew of the intended use to be made of the oil; the United States knew, or should have known, of its dangerous character, and failed to disclose such information to either Todd or Sheffield.

The motion to dismiss the petition of the United States raises two vital questions: First, since only the "owner" of a vessel may petition for limitation of liability, is the United States an "owner" within the meaning of 46 U.S.C., Sec. 183(a)? Second, does the nature of the claim (action based on breach of seller's warranty) asserted by Todd in its libel against the United States preclude this petition by the United States for limitation?

At the hearing herein Todd expressly relied solely on the nature of its claim as precluding this petition. However, as only the "owner" of a vessel may petition for limitation [46 U. S. C., § 183(a); 13 Benedict, Admiralty, § 498 (6th Ed., 1940)], this Court, as it must, has considered the jurisdictional issue whether the United States qualifies as an owner. In other words, may a person who at the time of the accident had neither legal nor equitable title qualify as an owner if the accident was proximately caused by such person's conduct at a

time when he unquestionably was the owner and unquestionably had the right of limitation?

The United States has cited authorities wherein the Courts have upheld petitions filed after the petitioners had disposed of their ownership in the vessels. However, in each of these cases the liability against which limitation was sought arose during the period of petitioner's ownership.

Milwaukee,

48 F. 2d 842 (E.D. Wisc., 1931);

The Columbia,

37 F. 2d 95 (2nd Cir., 1930);

The Giles Loring,

48 Fed. 463 (D.C. Maine, 1890).

In the instant case liability, if any, arose after the United States had disposed of all right, title and interest in the Trojan. Generally, it may be observed that the Courts uniformly have construed "owner" in a manner which will effectuate the purpose of this Act. Section 183 of Title 46 was designed by the Congress to encourage shipbuilding, and to induce investment in the shipping industry by limiting an owner's liability to the value of his interest in the vessel (plus pending freight). *British Transport Commission v. United States*, 354 U.S. 129 (1957). Thus it is this Court's opinion that in order to effectuate the purposes of the Act the motion to dismiss herein should be denied. To hold otherwise would subject a person to greater liability after a sale than existed before a sale.

The weakness of such a holding appears when it is recalled that the alleged liability arose as the result of negligent conduct occurring before sale and during ownership, at which time limitation would clearly have been available.

In the case of *Highland Nav. Corp.*, 29 F. 2d 37 (2nd Cir., 1928), two excursion vessels were totally destroyed by fire while being prepared for service following the winter's lay up and sank beside a pier belonging to the City of New York. The owner of the vessels gave proper notice of abandonment. The City of New York sought damages for (1) the cost of removing the wrecks, and (2) losses due to obstruction of the pier. The District Court, in allowing the petition for limitation, declared that "an abandoned vessel has no owner." *Highland Nav. Corp.*, 24 F. 2d 582 (D.C. N.Y., 1927). The Court of Appeals, 29 F. 2d 37 (2nd Cir., 1928), in affirming the District Court, impliedly recognized the right to seek limitation for an alleged liability arising after the termination of ownership.

Todd contends that under *American Car & Foundry Co. v. Brassert*, 289 U.S. 261 (1932), the limitation act is not available against a claim based on breach of seller's warranty. In the *Brassert* case the petitioner was the manufacturer of a small pleasure craft. He sold the vessel to the claimant under a conditional sales contract, reserving title until complete payment. After delivery of the vessel it was totally destroyed, allegedly due to manufacturing defects. The Court held that under the

circumstances limitation proceedings were not available. This Court is of the view that use of the term "vendor" in the Brassert opinion is merely descriptive of petitioner's primary status as manufacturer. The Court said: "Petitioner's liability, if any * * * would depend upon petitioner's conduct as maker of the vessel * * *" (at page 266), and "the purpose (of the act) was not concerned with * * * manufacture, which itself is not a maritime activity." (Emphasis supplied.) Thus, if petitioner as a manufacturer not engaged in maritime activity could not have the benefit of limitation before the sale, he is in no better position after the sale.

In addition it is well to point out that even if we accept Todd's interpretation of the Brassert case there is the possibility of other claims which are clearly subject to limitation being filed against the United States by Sheffield and the many personal injury claimants. Although it has been suggested (Gilmore & Black, Law of Admiralty p. 685) that the pre-1936 rule allowing the filing of a petition for limitation before the assertion of any claims [The Alcyone, 50 F. 2d 186 (E.D. N.Y., 1931)] might be abrogated by the wording of §§ 183(a) and 185 (as amended in 1936), the pre-1936 rule has been followed. In *Petition of Wood*, 124 F. Supp. 541 (S.D. N.Y., 1954), the Court, in holding that a petition could be filed even though no claim had yet been asserted, relied on Admiralty Rule 51, which provides, in part, that the petition should state "what claims, if any, are pending."

Thus, the motion to dismiss herein must be denied as there is the possibility of claims being asserted which are clearly subject to limitation.

Further, once it has been determined that a seller engaged in maritime activity is an owner entitled to limitation, it is clear that the Court in the *Brasert* case did not intend that the availability of limitation proceedings could be avoided merely by the form of the pleadings or the theory of the claim asserted.

In accordance with the above opinion the Court orders that the motion to dismiss the petition of the United States for exoneration from or limitation of liability be, and the same is hereby Denied.

Dated: October 28th, 1958.

/s/ ALBERT C. WOLLENBERG,
United States District Judge.

[Endorsed]: Filed October 28, 1958.

[Title of District Court and Cause.]

ANSWER OF TODD SHIPYARDS CORPORATION
TO CROSS-LIBEL OF UNITED
STATES OF AMERICA

Comes Now claimant and cross-respondent Todd Shipyards Corporation without admitting the jurisdiction of this court to the above-entitled proceeding, without waiving its objections thereto and an-

swering the cross-libel of petitioner United States of America, on information and belief admits, denies and alleges as follows:

I.

Admits the allegations of Article I.

II.

Admits the allegations of Article II except denies that cross-respondent's principal place of business is in the City of Alameda, State of California, or within the jurisdiction of the above-entitled court.

III.

Admits the allegations of Article III.

IV.

Admits the allegations of Article IV of said cross-libel except that it denies that its impleading petition in admiralty cause No. 27506 claimed recovery from petitioner United States of America on the basis of its alleged acts and failures as owner of said Trojan (ex the Jeanny).

V.

Admits the allegations of Article V except that it denies that the libel referred to therein was filed on April 8, 1958, and alleges that said libel was filed on April 2, 1958, and except that it denies that recovery in said libel was claimed on the basis of alleged acts and failures to act of petitioner as owner of the Trojan (ex Jeanny).

VI.

Admits the allegations of Article VI except that it denies that the complaint referred to therein was filed on April 8, 1958, and alleges that said complaint was filed on April 2, 1958, and except that it denies that recovery in said complaint was claimed on the basis of alleged acts or failures to act, of petitioner as owner of the Trojan (ex Jeanny).

VII.

Admits the allegations of Article VII.

VIII.

Admits the allegations of Article VIII except that it denies that said Trojan was berthed as a dead ship in the Suisun Bay Reserve Fleet of United States Maritime Administration until December 26, 1956.

IX.

Admits the allegations of Article IX.

X.

Admits the allegations of Article X, except that it denies that it became obligated in any respect other than stated in Contract MA-293 and Job Order No. 51 and denies that it became obligated to take exclusive custody, control and operation of said vessel.

XI.

Admits the allegations of Article XI except that it denies that it undertook or became obligated in

any respect other than as provided in Contract MA-293 and Job Order No. 51A and demands strict proof of the allegation in said Article of the specific work alleged.

XII.

Denies the allegations of Article XII.

XIII.

Admits the allegations of Article XIII.

XIV.

Admits the allegations of Article XIV.

XV.

Denies the allegations of Article XV.

XVI.

Denies the allegations of Article XVI.

XVII.

Denies the allegations of Article XVII.

XVIII.

Cross-respondent refers to and incorporates as if fully set forth herein all of the allegations, admissions and denials in the foregoing answers to Articles I, II, III, IV, V, VI, VII, VIII, XIV, and XVII of cross-libel.

XIX.

Denies the allegations of Article XIX of said cross-libel and each subdivision thereof.

And further answering the allegations of the cross-libel aforesaid and by way of a First Affirmative Defense thereto, cross-respondent alleges:

XX.

That Contract MA-293 referred to in the cross-libel provided that the obligations of the contractor to indemnify the United States, its agencies and its instrumentalities should not include actions, claims, costs or demands for death, personal injury or property damage arising or resulting from the fault of the United States, its agencies or instrumentalities or the vessel owners, and in any event:

“shall not exceed the sum of \$30,000 on account of any one accident or occurrence in respect to any one vessel and shall not extend to suits, actions, claims, costs or demands arising out of damages or injury caused by an accident or occurrence occurring later than sixty (60) days after the redelivery of the vessel upon which the work was performed.”

That cross-respondent claims the benefit of the foregoing provisions of said contract and alleges that insofar as any of the matters referred to in said cross-libel occurred out of work done by cross-respondent under said Contract MA-293 or Job Orders 51 and 51A referred to in said cross-libel, same was not proximately caused by or the result of negligence or omission or failure on the part of

cross-respondent but was proximately caused by or resulted from the fault of United States, its agencies and instrumentalities or the vessel owners and by an occurrence or discovery later than sixty (60) days from the date the Trojan was redelivered to the United States.

And further answering the allegations of said cross-libel and by way of a Second Affirmative Defense thereto, cross-respondent alleges:

I.

That the explosion and fire referred to in said cross-libel and the personal injuries, deaths and damages resulting therefrom were proximately caused or contributed to by the faults, omissions and failures of cross-libelant in the respects alleged and set forth in the claim of said Todd Shipyards Corporation on file in this proceeding.

Wherefore, cross-respondent prays that the cross-libel herein be dismissed and in the alternative, but only in the alternative, that if cross-respondent should be held liable upon the matters and things alleged in said cross-libel that its liability be limited to \$300,000, for its costs of suit herein incurred and for such other and further relief as in justice it may be entitled to.

Dated November 12, 1958.

/s/ McCUTCHEN, DOYLE,
BROWN & ENERSEN,

/s/ RUSSELL A. MACKEY,

/s/ BRYANT K. ZIMMERMAN,

/s/ CROWELL, ROUSE &
VARIAN,

Proctors for Cross-
Respondent.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed November 12, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Todd Shipyards Corporation, claimant in the above-entitled proceeding, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the above-entitled court entered in the above-entitled proceeding on October 28, 1958, which order denied the motion by claimant to dismiss the petition and vacate and dissolve the restraining order and injunction herein, and from each and every part of said Order.

Dated: November 12, 1958.

/s/ McCUTCHEN, DOYLE,
BROWN & ENERSEN,

/s/ RUSSELL A. MACKEY,

/s/ BRYANT K. ZIMMERMAN,
/s/ CROWELL, ROUSE & VARIAN,
Proctors for Todd Shipyards
Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed November 12, 1958.

[Title of District Court and Cause.]

MOTION TO SUPPLEMENT RECORD
ON APPEAL

Comes now Petitioner United States of America and moves this Honorable Court, pursuant to Rule 75(h), Federal Rules of Civil Procedure, made applicable by Rule 8 of the Rules of the United States Court of Appeals for the Ninth Circuit, for an order directing the Clerk to file herein and certify to the Court of Appeals for the Ninth Circuit as part of the record on appeal herein true copies of the following documents from the files of the United States District Court for the Northern District of California: the Petition to Implead the United States of America filed by Todd Shipyards Corporation as Cross-Respondent in the case of Todd Shipyards Corporation v. the Steam Tanker Trojan, et al., formerly Admiralty No. 27506, now consolidated with the case, in the Matter of the Petition of Sheffield Tankers Corporation, Admiralty No. 27543, and the Answer thereto; the Libel

in the case of Todd Shipyards Corporation v. United States of America, Admiralty No. 27702; and the Complaint in the case of Todd Shipyards Corporation v. United States of America, Civil No. 37181.

This motion is based upon the entire record herein and is made upon the grounds that the said documents are referred to in the record herein, that they were referred to in proceedings before this Court on the motion of Claimant Todd Shipyards Corporation to dismiss the petition; that this Court could and did take judicial notice of such documents in its consideration of the said motion; and that the said documents are or may be material to the issues on appeal herein.

ROBERT H. SCHNACKE,
United States Attorney,

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General,

/s/ GRAYDON S. STARING,
Attorney, Department of Justice, Admiralty and
Shipping Section, Proctors for Petitioner
United States of America.

Affidavit of mail attached.

[Endorsed]: Filed November 21, 1958.

[Title of District Court and Cause.]

ORDER TO SUPPLEMENT RECORD
ON APPEAL

Upon hearing and consideration of Petitioner's Motion to Supplement Record on Appeal herein, it is hereby

Ordered that the said Motion be and it hereby is granted and that the Clerk file herein and certify to the Court of Appeals for the Ninth Circuit as part of the record on appeal herein true copies of the Petition to Implead the United States of America filed by Todd Shipyards Corporation as Cross-Respondent in the case of Todd Shipyards Corporation v. the Steam Tanker Trojan, et al., formerly Admiralty No. 27506, now consolidated with the case, in the Matter of the Petition of Sheffield Tankers Corporation, Admiralty No. 27543, and the Answer thereto; the Libel in the case of Todd Shipyards Corporation v. United States of America, Admiralty No. 27702; and the Complaint in the case of Todd Shipyards Corporation v. United States of America, Civil No. 37181, the said copies to be furnished to the Clerk by Petitioner under a cover sheet captioned herein.

Dated December 11th, 1958.

/s/ ALBERT C. WOLLENBERG,
United States District Judge.

[Endorsed]: Filed December 11, 1958.

[Title of District Court and Cause.]

TRUE COPIES OF: PETITION TO IMPLEAD
UNITED STATES IN FORMER ADMI-
RALTY NO. 27506, NOW CONSOLIDATED
WITH ADMIRALTY NO. 27543; LIBEL IN
ADMIRALTY NO. 27702; COMPLAINT IN
CIVIL NO. 37181

United States District Court for the Northern Dis-
trict of California, Southern Division in Admiralty
No. 27506

TODD SHIPYARDS CORPORATION, a Cor-
poration, Libelant,
vs.

The Steam Tanker TROJAN (ex the JEANNY),
Her Engines, Machinery, Boilers, Boats,
Tackle, Apparel, etc., and SHEFFIELD
TANKERS CORPORATION, a Corporation,
Respondents.

SHEFFIELD TANKERS CORPORATION, a
Corporation, in Its Own Behalf and as Owner
of the Steam Tanker TROJAN (ex the
JEANNY), Cross-Libelant,
vs.

TODD SHIPYARDS CORPORATION, a Cor-
poration, Cross-Respondent.

UNITED STATES OF AMERICA,
Respondent-Impleaded.

PETITION TO IMPLEAD U.S.A.
AS TO CROSS-LIBEL

To the Honorable Judges of the United States District Court for the Northern District of California, Southern Division.

The petition of Todd Shipyards Corporation, Cross-Respondent (hereinafter designated Todd) as it is proceeded against in the cross-libel of Sheffield Tankers Corporation (hereinafter designated Sheffield) both in its own name and as owner of the American steam tank vessel Trojan (ex Jeanny), (and hereinafter designated as Trojan), to implead the United States of America (hereinafter designated Government), alleges upon information and belief as follows:

I.

Todd is and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of New York and at all said times owned, operated, managed, leased or controlled a certain ship repair yard and facilities in Alameda, California, within the jurisdiction of this Honorable Court.

II.

Sheffield is and at all of the times mentioned in the cross-libel herein was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is now and at all of the said times owned, operated, managed

and/or controlled the T-2 type steam tank vessel Trojan.

III.

The Government is a sovereign corporation which has consented to be sued under the circumstances hereafter alleged.

IV.

That on or about December 26, 1956, and prior thereto the Government owned, operated, managed and/or controlled the Trojan, then named the Jeanny, a merchant vessel of the United States of America, bearing official number 247177.

V.

On or about December 26, 1956, the Government for good and valuable consideration, sold, delivered and transferred the Jeanny (now Trojan) to Sheffield (then named Rotary Tankers Corporation), together with her apparel, equipment, appurtenances and stores, including, among other things, a quantity of fuel oil or bunker oil located in the vessel's port and starboard aft bunker tanks.

VI.

Thereafter and on or about January 4, 1957, Sheffield, (then named Rotary Tankers Corporation), entered into a contract in writing with Todd for the performance by Todd at its ship repair yard, Alameda, California, of certain specified repairs together with the supply of certain materials, all in connection with the preparation of said ves-

sel for continued service as a merchant vessel of the United States of America.

VII.

On January 29, 1957, while the Trojan was lying afloat in the Todd ship repair yard, Alameda, California, as aforesaid, and while Sheffield, its agents, servants, employees and/or representatives was engaged in the lighting off of the boiler room fires and the heating and drawing of the oil in the said bunker tanks, an explosion or explosions occurred in the machinery spaces of said vessel followed by fire.

VIII.

Said explosion or explosions and fire resulted in extensive physical damage to the Trojan, including detention of the vessel during the course of repair of said damage, and in the death and personal injuries of several of the members of the crew of said vessel as well as employees of Todd.

IX.

On or about August 29, 1957, Sheffield on its own behalf and as owner of the Trojan filed a cross-libel in this Court against Todd to recover against Todd certain damages alleged to have resulted from said explosion or explosions and fire upon the ground that the same were caused or contributed to by fault or neglect or breach of contract by Todd while engaged in the performance of such repairs. Said cross-libel alleged inter alia the following:

“V.

“By reason of the foregoing, the Trojan was damaged. Bunkers were destroyed. Members of the crew and employees of Todd, and others, were killed and injured and sustained loss of or damage to property. The vessel was detained at great loss of profits and earnings to Sheffield. Extensive repairs were occasioned by the casualty. Much of the repair and reactivation already completed at the time of the casualty had to be redone.

VI.

“By reason of the foregoing, Sheffield and the Trojan sustained damage in an amount not now precisely known but in excess of \$1,500,000.00.

VII.

“In addition, by reason of the foregoing, the Trojan and Sheffield have been sued by employees of Todd and others for death and personal injuries in an aggregate amount in excess of \$1,400,000.00, and additional suits will be commenced in amounts presently unascertained, but in excess of an additional one million dollars, as to which Sheffield reserves the right to amend its cross-libel. Sheffield will be damaged in the amount, if any, which it may be required to pay on account of said personal injuries and deaths, and for the costs and expenses required in the defense of said claims. By reason of the premises said dam-

ages, costs and expenses, to the extent sustained or incurred by Sheffield, should be borne by cross-respondent.”

X.

Todd alleges that at and prior to the time the Government sold, delivered and transferred the Jeanny (now Trojan) to Sheffield and at the time said vessel was placed by Sheffield in Todd's ship repair yard for the aforesaid repairs and on January 29, 1957, at the time said explosion or explosions and fire occurred, such fuel oil as was then in the vessel's port and starboard aft bunker tanks was admixed, in violation of the applicable statutes and regulations, with highly volatile, inflammable, explosive and imminently or inherently dangerous materials, or which admixture became imminently explosive and dangerous when subject to the uses and operations intended.

XI.

Todd alleges that the Government knew or should have known with the exercise of reasonable prudence and disclosed the imminently or inherently dangerous character and condition of such fuel oil but failed and neglected to do so and sold, transferred and delivered the same in violation of applicable statutes and regulations made and provided therefor, knowing the uses and purposes to which such fuel oil would be placed.

XII.

Todd alleges that said explosion or explosions and

fire which occurred on January 29, 1957, on board the Trojan with consequent extensive physical damage and other damage and personal injuries and death sustained by the members of the vessel's crew, employees of Todd and others, as alleged in Sheffield's cross-libel (Articles V, VI and VII) was or may be ultimately held to have been the primary, proximate or efficient result of the fault and negligence of the Government by reason of the matters and things alleged in this petition. If Todd should be held to be under any liability to Sheffield by reason of any of the matters alleged in the cross-libel of Sheffield, which liability Todd hereby specifically denies, then any and all such liability would ultimately be the primary, proximate or efficient result of the fault and negligence of the Government in that, among other things which will be shown at the trial herein, the Government, acting by and through the Maritime Administration, its agents, servants, representatives, and employees having custody, possession, supervision and control over the Jeanny (now Trojan), and those servants, agents, employees and/or representatives in charge of or jurisdiction over bids, tenders and contract or contracts for and the sale, transfer and delivery of said vessel, its apparel, appurtenances, inventory, fuel oil, consumable broached and unbroached stores,

1. Failed and neglected to inspect, sample and analyze fuel oil located in the port and starboard aft bunker tanks of said vessel before the sale and

delivery thereof as consumable bunker fuel oil for said vessel;

2. Failed and neglected to inspect, sample and analyze the said oil before the sale and delivery of the vessel together with its appurtenances, inventory and equipment including the oil located in the port and starboard bunker tanks of said vessel;

3. Failed and neglected to make a proper or any gas or explosive mixture test of the port and starboard aft bunker tanks of said vessel prior to the sale and delivery thereof to ascertain the condition and explosibility thereof and of the material in said tanks;

4. Failed and neglected to ascertain prior to the time of the sale and delivery of said vessel, its appurtenances, equipment and inventory and of the fuel oil located in said vessel's port and starboard aft bunker tanks, that said material therein contained was admixed with highly volatile, inflammable, and explosive substances which rendered the same imminently and inherently dangerous when subjected to heating and normal usage as vessel fuel oil or bunkers.

5. In the sale and delivery of said vessel, her appurtenances, equipment and inventory which included in its port and starboard aft bunker tanks oil admixed with highly volatile explosive and imminently or inherently dangerous substances, without disclosure of such conditions;

6. In the sale and delivery of oil contained in the port and starboard bunker tanks of said vessel, which oil was admixed with highly volatile, inflammable and imminently dangerous substances or which mixture would become explosive and imminently dangerous when subjected to the uses and operations intended;

7. In the sale and delivery of material contained in the port and starboard aft bunker tanks of said vessel, representing the same, expressly or impliedly, to be "Bunker C" fuel oil and without disclosure that such material was admixed with highly volatile, inflammable, explosive and imminently or inherently dangerous substances;

8. In the sale and delivery of the material contained in the port and starboard aft bunker tanks of said vessel as bunker fuel oil in contravention of the applicable provisions of Title 46, Code of Federal Regulations, Parts 30-39, inclusive, promulgated by the U. S. Coast Guard and entitled, "Rules and Regulations for Tank Vessels," and particularly Article 35.25-10 thereof.

9. In the sale and delivery of the material contained in the port and starboard aft bunker tanks of said vessel as bunker fuel oil in contravention of the applicable provisions of Title 46, U. S. Code, Section 881, and rules and regulations of the American Bureau of Shipping entitled, "Rules for the Classification and Construction of Steel Vessels," and particularly Section 36, Art. 24 thereof.

XIII.

By reason of the premises any and all such liability should be borne by the Government and not by Todd and the said Government should be proceeded against directly in this Court by Sheffield. Alternatively, if Todd should be held under any liability by reason of any of the matters alleged in the cross-libel then and in such event Todd is entitled to recovery over against the Government to the extent of any such liability.

XIV.

The Government has consented by law to be sued herein by the Act of Congress known as the "Suits in Admiralty Act (46 U. S. Code, § 741 et. seq.) or in the alternative under the Public Vessels Act 46 U. S. Code, § 781 et. seq.), or in the alternative under the Federal Tort Claims Act (title 28, U. S. Code, § 1346 et. seq.), Act of Congress August 2, 1946, as amended and supplemented, including Title 28 U. S. Code § 2674.

XV.

All and singular the premises are true and within the Admiralty jurisdiction of the United States of America and of this Honorable Court.

Wherefore, petitioner, Todd Shipyards Corporation, prays that a citation in due form of law in accordance with the rules and practice of this Honorable Court may issue against the United States of America, respondent-impleaded herein:

1. Citing it to appear and answer upon oath all and singular the matters in this petition and in the cross-libel set forth and that such respondent-impleaded may be proceeded against as if originally made a party herein, and

2. That this Court may dismiss the cross-libel herein as against petitioner, Todd Shipyards Corporation, with costs, and may hold the said impleaded respondent, United States of America, liable for any damages that the cross-libelant may be entitled to recover herein, and that in the alternative that petitioner may have recovery over against respondent-impleaded for any damages for which petitioner may be found liable herein, and

3. That said petitioner may have such other and further relief in the premises as to the Court may seem just and proper.

McCUTCHEN, THOMAS, MATTHEW, GRIF-
FITHS & GREENE,

CROWELL, ROUSE &
VARIAN,

Proctors for Todd Shipyards
Corporation.

[Endorsed]: Filed December 20, 1957.

United States District Court for the Northern Dis-
trict of California, Southern Division

No. 27702—In Admiralty

TODD SHIPYARDS CORPORATION, a Cor-
poration,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LIBEL

To the Honorable Judges of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Southern Division

The libel of Todd Shipyards Corporation (hereinafter designated "Todd") against United States of America (hereinafter designated "Government") in a cause of action civil and maritime, alleges on information and belief as follows:

I.

Todd is and at all the times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of New York and at all of said times owned, operated, managed, leased or controlled a certain ship repair yard and facilities in Alameda, California, within the jurisdiction of this Honorable Court.

II.

The Government is a sovereign state which has consented to be sued under the circumstances hereinafter alleged.

III.

Sheffield Tankers Corporation, formerly named Rotary Tankers Corporation, (hereinafter called "Sheffield") is and at all the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware. That on and at all times subsequent to December 26, 1956, said Sheffield owned, operated, managed, controlled and was in possession of the T-2 type steam tank vessel Trojan, formerly named the Jeanny (hereinafter called the "Trojan").

IV.

On or about December 26, 1956, and prior thereto, the Government owned, operated, managed, controlled and was in possession of said tank vessel Trojan, then named the Jeanny, bearing Official No. 247177, as a merchant vessel of the United States of America.

V.

On or about December 26, 1956, the Government for good and valuable consideration, sold, delivered and transferred the said Trojan to Sheffield (then named Rotary Tankers Corporation), together with her apparel and outfit, and further separately sold for good and valuable consideration to said Sheffield, among other things, a quantity of oil located, among other tanks, in said vessel's port and star-

board after bunker tanks. That all the oil so sold was sold by the Government as fuel oil of the character customarily used as bunker oil and commonly described as Bunker C fuel, hereinafter called "Bunker C fuel oil").

VI.

Thereafter and on or about January 4, 1957, Sheffield (then named Rotary Tankers Corporation), entered into a contract in writing with Todd for the performance by Todd at its ship repair yard, Alameda, California, of certain specified repairs, and to supply certain materials, all in connection with the preparation of said vessel for continued service as a merchant vessel of the United States of America. Thereafter the vessel was delivered to Todd's plant at Alameda, California, for such repairs.

VII.

On January 29, 1957, while said Trojan was lying afloat at Todd's ship repair yard, Alameda, California, as aforesaid, an explosion or explosions occurred in the port bunker tank and machinery spaces of said vessel, followed by fire. That said explosion or explosions and fire occurred while Sheffield, its crew, agents, servants, employees and representatives were engaged in heating the oil in the said bunker tanks and pumping said oil from the bunker tanks to the boiler room and lighting off the boiler room fires and using said oil in connection therewith, in order to dry out newly installed brick.

VIII.

Said explosion or explosions and fire resulted in extensive physical and other damage to property of Todd and damage to the said Trojan and Sheffield, including damages for detention of the vessel during the course of repair of said damage. Said explosion or explosions and fire also resulted in the death of one member of the crew of said Trojan and death of and personal injuries to others, including employees of Todd and certain subcontractors of Todd.

IX.

By reason of the foregoing: Todd sustained extensive direct and other damages in the amount of approximately One Hundred Thousand Dollars (\$100,000); a number of suits in admiralty and actions at law have been commenced against Todd, individually, and against Todd and Sheffield, jointly and severally, on account of damages resulting from the personal injuries and deaths aforesaid; a cross-libel in admiralty has been commenced by Sheffield against Todd for physical damages sustained by the said Trojan and damages for detention of said vessel and for indemnity for the amount Sheffield may be adjudged and required to pay on account of the personal injury and death claims aforesaid, all in an aggregate amount in excess of Eight Million Dollars (\$8,000,000). Other claims may be asserted and suits filed in respect to matters concerning which libelant is not now informed in which event libelant will amend and asks leave to amend this libel accordingly.

X.

At and prior to the time the Government sold, delivered and transferred said Trojan to Sheffield, and at the time the Government sold and delivered the oil in the aft bunker tanks of said vessel to Sheffield and at the time said vessel was placed by Sheffield at Todd's ship repair yard for the afore-said repairs, and on January 29, 1957, at the time the said explosion or explosions and fire occurred, said oil was not Bunker C fuel oil as represented and sold, but on the contrary, in violation of the applicable statutes, regulations and said representations, was an admixture of highly volatile, inflammable, explosive and inherently or imminently dangerous substances which in fact made it highly volatile, inflammable, explosive and imminently dangerous or which became imminently explosive and dangerous and resulted in its throwing off vapors in explosive and dangerous quantities when heated or subjected to the intended uses and operations of fuel oil on tanker vessels such as the Trojan.

XI.

The Government breached said representation that the oil in the vessel's port and starboard aft bunker tanks was Bunker C fuel oil. The Government knew, or with the exercise of reasonable care and prudence should have known and disclosed, the imminently or inherently dangerous character and condition of such oil, but failed and neglected to do so, and sold, transferred and delivered the same in violation of the applicable statutes and regulations made and

provided therefor and its obligations, knowing the purposes for which said oil would be used.

XII.

Todd alleges that said explosion or explosions and fire which occurred on January 29, 1957, on board the Trojan with consequent extensive physical damage and other damage and personal injuries and death were, or may be held to be, the primary, proximate or efficient result of the fault and negligence of the Government by reason of the matters and things alleged herein. If Todd should be held to be under any liability therefor, which liability Todd hereby specifically denies, then any and all such liability would ultimately be the primary, proximate or efficient result of the fault and negligence of the Government in that, among other things which will be shown at the trial herein, the Government, acting by and through the Maritime Administration, its agents, servants, representatives, and employees having custody, possession, supervision and control over the said Trojan and of the oil in her aft port and starboard bunker tanks, and those servants, agents, employees and/or representatives in charge of or having jurisdiction over bids, tenders and contract or contracts for the sale, transfer and delivery of said vessel, its apparel, appurtenances, inventory and of the fuel oil, consumable broached and unbroached stores; negligently:

1. Breached its representation, express or implied that the oil located in the vessel's port and starboard bunker tanks was Bunker C fuel oil;

2. Failed and neglected to inspect, sample and analyze the oil located in the port and starboard aft bunker tanks of said vessel before the sale and delivery thereof as consumable Bunker C fuel oil for said vessel;

3. Failed and neglected to inspect, sample and analyze the said oil before the sale and delivery of the vessel together with its appurtenances, inventory and equipment including the oil located in the port and starboard bunker tanks of said vessel;

4. Failed and neglected to make a proper or any gas or explosive mixture test of the port and starboard aft bunker tanks of said vessel prior to the sale and delivery thereof to ascertain the condition and explosibility thereof and of the material in said tanks;

5. Failed and neglected to ascertain prior to the time of the sale and delivery of said vessel its appurtenances, equipment and inventory and of the oil located in said vessel's port and starboard aft bunker tanks, that said material therein contained was admixed with highly volatile, inflammable, and explosive substances which rendered the same imminently and inherently dangerous when subjected to heating and normal usage as fuel and bunker oil;

6. Sold and delivered said vessel, her appurtenances, equipment and inventory and the oil in its port and starboard aft bunker tanks which oil was admixed with highly volatile, explosive and im-

minently or inherently dangerous substances without disclosure of such conditions;

7. Sold and delivered the oil contained in the port and starboard bunker tanks of said vessel, which oil was admixed with highly volatile, inflammable and imminently dangerous substances or which mixture would become explosive and imminently dangerous when subjected to the uses and operations intended;

8. Sold and delivered the oil contained in the port and starboard aft bunker tanks of said vessel representing the same expressly or impliedly, to be Bunker C fuel oil and without disclosure that such material was admixed with highly volatile, inflammable, explosive and imminently or inherently dangerous substances;

9. Sold and delivered the oil contained in the port and starboard aft bunker tanks of said vessel as Bunker C fuel oil in contravention of the applicable provisions of Title 46, Code of Federal Regulations, Parts 30-39, inclusive, "Rules and Regulations for Tank Vessels," and particularly Article 35.25-10 thereof;

10. Sold and delivered the material contained in the port and starboard aft bunker tanks of said vessel as Bunker C fuel oil in contravention of the applicable provisions of Title 46, U.S. Code, Section 881, and rules and regulations of the American Bureau of Shipping entitled, "Rules for the Classifica-

tion and Construction of Steel Vessels," and particularly Section 36, Art. 24 thereof.

XIII.

Todd alleges that said explosion or explosions followed by fire were or may be held to have been the primary, proximate or efficient result of the breaches, defaults and negligence of the Government as alleged herein.

XIV.

By reason of the premises any and all such liability should be borne by the Government and if Todd should be held under any liability by reason of any of the matters alleged herein then and in such event Todd is entitled to be indemnified by the Government to the extent of any such liability.

XV.

The Government has consented by law to be sued herein by the Act of Congress known as the "Suits in Admiralty Act" (46 U.S. Code, Sec. 741 et seq.) or in the alternative under the Public Vessels Act (46 U.S. Code, Sec. 781 et seq.), or in the alternative under the Federal Tort Claims Act (Title 28, U.S. Code, Sec. 1346 et seq.), Act of Congress, August 2, 1946, as amended and supplemented, including Title 28, U.S. Code Sec. 2674.

XVI.

All and singular the premises are true and within the Admiralty jurisdiction of the United States of America and of this Honorable Court.

Wherefore, libelant, Todd Shipyards Corporation, prays as follows:

1. That a citation in due form of law in accordance with the rules and practices of this Honorable Court may issue against the United States of America, respondent herein, citing said respondent to appear and answer upon oath all and singular the matters in this libel set forth, and

2. That a decree be entered herein in favor of libelant, Todd Shipyards Corporation, and against the United States of America, respondent, for and to the extent of libelant's direct damages aforesaid, and for and to the extent that libelant may be held liable to other parties on account of the said explosions and fire and to the extent that any damages may be recovered against libelant by reason of the matters and things referred to herein, together with legal fees and expenses incurred by libelant in defending claims and suits asserted against it, and for libelant's costs of suit herein incurred and for such other and further relief in the premises as to the Court may seem just and proper.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,

CROWELL, ROUSE & VARIAN,
Proctors for Todd Shipyards
Corporation.

Duly Verified.

[Endorsed]: Filed April 2, 1958.

United States District Court for the Northern
District of California, Southern Division

At Law Civil No. 37181

TODD SHIPYARDS CORPORATION, a Corpo-
ration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

To the Honorable Judges of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Southern Division

The complaint of Todd Shipyards Corporation
(hereinafter called "Todd") against defendant,
United States of America (hereinafter called the
"Government") alleges on information and belief
as follows:

I.

Todd is and at all the times herein mentioned has
been a corporation duly organized and existing
under and by virtue of the laws of the State of
New York and at all of said times owned, operated,
managed, leased or controlled a certain ship repair
yard and facilities in Alameda, California, within
the jurisdiction of this Honorable Court.

II.

The Government has consented by law to be sued

herein under the Federal Tort Claims Act Title 28, U.S. Code Sec. 1346 et seq.), Act of Congress August 2, 1946, as amended and supplemented, including Title 28, U.S. Code Sec. 2674, and by the Act of Congress known as the Suits in Admiralty Act (46 U.S. Code Sec. 741 et seq.) or in the alternative under the Public Vessels Act (46 U.S. Code Sec. 781 et seq.).

III.

Sheffield Tankers Corporation, formerly named Rotary Tankers Corporation, (hereinafter called "Sheffield") is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware. That on and at all times subsequent to December 26, 1956, said Sheffield owned, operated, managed, controlled and was in possession of the T-2 type steam tank vessel Trojan, formerly named the Jeanny (hereinafter called the "Trojan").

IV.

On or about December 26, 1956, and prior thereto, the Government owned, operated, managed, controlled and was in possession of said tank vessel Trojan, then named the Jeanny, bearing Official No. 247177, as a merchant vessel of the United States of America.

V.

On or about December 26, 1956, the Government for good and valuable consideration, sold, delivered and transferred the said Trojan to Sheffield (then

named Rotary Tankers Corporation), together with her apparel and outfit, and further separately sold for good and valuable consideration to said Sheffield, among other things, a quantity of oil located, among other tanks, in said vessel's port and starboard after bunker tanks. That all the oil so sold was sold by the Government as fuel oil of the character customarily used as bunker oil and commonly described as Bunker C fuel oil (hereinafter called "Bunker C fuel oil").

VI.

Thereafter and on or about January 4, 1957, Sheffield (then named Rotary Tankers Corporation), entered into a contract in writing with Todd for the performance by Todd at its ship repair yard, Alameda, California, of certain specified repairs, and to supply certain materials, all in connection with the preparation of said vessel for continued service as a merchant vessel of the United States of America. Thereafter the vessel was delivered to Todd's plant at Alameda, California, for such repairs.

VII.

On January 29, 1957, while said Trojan was lying afloat at Todd's ship repair yard, Alameda, California, as aforesaid, an explosion or explosions occurred in the port bunker tank and machinery spaces of said vessel, followed by fire. That said explosion or explosions and fire occurred while Sheffield, its crew, agents, servants, employees and representatives were engaged in heating the oil in the

said bunker tanks and pumping said oil from the bunker tank to the boiler room and lighting off the boiler room fires and using said oil in connection therewith, in order to dry out newly installed brick.

VIII.

Said explosion or explosions and fire resulted in extensive physical and other damage to property of Todd and damage to the said Trojan and Sheffield, including damages for detention of the vessel during the course of repair of said damage. Said explosion or explosions and fire also resulted in the death of one member of the crew of said Trojan and death of and personal injuries to others, including employees of Todd and certain subcontractors of Todd.

IX.

By reason of the foregoing: Todd sustained extensive direct and other damages in the amount of approximately One Hundred Thousand Dollars (\$100,000); a number of suits in admiralty and actions at law have been commenced against Todd, individually, and against Todd and Sheffield, jointly and severally, on account of damages resulting from the personal injuries and deaths aforesaid; a cross-libel in admiralty has been commenced by Sheffield against Todd for physical damages sustained by the said Trojan and damages for detention of said vessel and for indemnity for the amount Sheffield may be adjudged and require to pay on account of the personal injury and death claims aforesaid, all in an aggregate amount in excess of Eight Million

Dollars (\$8,000,000). Other claims may be asserted and suits filed in respect to matters concerning which plaintiff is not now informed in which event plaintiff will amend and asks leave to amend this complaint accordingly.

X.

At and prior to the time the Government sold, delivered and transferred said Trojan to Sheffield and at the time the Government sold and delivered the oil in the aft bunker tanks of said vessel to Sheffield and at the time said vessel was placed by Sheffield at Todd's ship repair yard for the afore-said repairs, and on January 29, 1957, at the time the said explosion or explosions and fire occurred, said oil was not Bunker C fuel oil as represented and sold, but on the contrary, in violation of the applicable statutes, regulations and said representations, was an admixture of highly volatile, inflammable, explosive and inherently or imminently dangerous substances which in fact made it highly volatile, inflammable, explosive and imminently dangerous or which became imminently explosive and dangerous and resulted in its throwing off vapors in explosive and dangerous quantities when heated or subjected to the intended uses and operations of fuel oil on tanker vessels such as the Trojan.

XI.

Todd alleges that said explosion or explosions and fire which occurred on January 29, 1957, on board the Trojan with consequent extensive physical damage and other damage and personal injuries and

death were, or may be held to be, the primary, proximate or efficient result of the fault and negligence of the Government by reason of the matters and things alleged herein. If Todd should be held to be under any liability therefor, which liability Todd hereby specifically denies, then any and all such liability would ultimately be the primary, proximate or efficient result of the fault and negligence of the Government in that, among other things which will be shown at the trial herein, the Government, acting by and through the Maritime Administration, its agents, servants, representatives, and employees having custody, possession, supervision and control over the said Trojan and of the oil in her aft port and starboard bunker tanks, and those servants agents, employees and/or representatives in charge of or having jurisdiction over bids, tenders and contract or contracts for the sale, transfer and delivery of said vessel, its apparel, appurtenances, inventory and of the fuel oil, consumable broached and unbroached stores; negligently:

1. Breached its representation, express or implied that the oil located in the vessel's port and starboard bunker tanks was Bunker C fuel oil;

2. Failed and neglected to inspect, sample and analyze the oil located in the port and starboard aft bunker tanks of said vessel before the sale and delivery thereof as consumable Bunker C fuel oil for said vessel;

3. Failed and neglected to inspect, sample and analyze the said oil before the sale and delivery of

the vessel together with its appurtenances, inventory and equipment including the oil located in the port and starboard bunker tanks of said vessel;

4. Failed and neglected to make a proper or any gas or explosive mixture test of the port and starboard aft bunker tanks of said vessel prior to the sale and delivery thereof to ascertain the condition and explosibility thereof and of the material in said tanks;

5. Failed and neglected to ascertain prior to the time of the sale and delivery of said vessel, its appurtenances, equipment and inventory and of the oil located in said vessel's port and starboard aft bunker tanks, that said material therein contained was admixed with highly volatile, inflammable, and explosive substances which rendered the same imminently and inherently dangerous when subjected to heating and normal usage as fuel and bunker oil;

6. Sold and delivered said vessel, her appurtenances, equipment and inventory and the oil in its port and starboard aft bunker tanks which oil was admixed with highly volatile, explosive and imminently or inherently dangerous substances without disclosure of such conditions;

7. Sold and delivered the oil contained in the port and starboard bunker tanks of said vessel, which oil was admixed with highly volatile, inflammable and imminently dangerous substances or which mixture would become explosive and im-

minently dangerous when subjected to the uses and operations intended;

8. Sold and delivered the oil contained in the port and starboard aft bunker tanks of said vessel representing the same expressly or impliedly, to be Bunker C fuel oil and without disclosure that such material was admixed with highly volatile, inflammable, explosive and imminently or inherently dangerous substances;

9. Sold and delivered the oil contained in the port and starboard aft bunker tanks of said vessel as Bunker C fuel oil in contravention of the applicable provisions of Title 46, Code of Federal Regulations, Parts 30-39, inclusive, "Rules and Regulations for Tank Vessels," and particularly Article 35.25-10 thereof;

10. Sold and delivered the material contained in the port and starboard aft bunker tanks of said vessel as Bunker C fuel oil in contravention of the applicable provisions of Title 46, U.S. Code Section 881, and rules and regulations of the American Bureau of Shipping entitled, "Rules for the Classification and Construction of Steel Vessels," and particularly Section 36, Art. 24 thereof.

XII.

Todd alleges that said explosion or explosions followed by fire were or may be held to have been the primary, proximate or efficient result of the breaches, defaults and negligence of the Government as alleged herein.

XIII.

By reason of the premises any and all such liability should be borne by the Government and if Todd should be held under any liability by reason of any of the matters alleged herein then and in such event Todd is entitled to be indemnified by the Government to the extent of any such liability.

XIV.

All and singular the premises are true and within the jurisdiction of the United States and of this Honorable Court.

Wherefore, plaintiff Todd Shipyards Corporation, demands judgment against the defendant, United States of America,

(a) for its direct damages sustained by it herein to the amount of approximately One Hundred Thousand Dollars (\$100,000);

(b) for indemnity against any sum or sums which it may be adjudged to pay by reason of any of the matters or things stated or referred to herein, together with legal fees and expenses incurred in defending claims and suits asserted against it;

(c) Costs of suit;

(d) Reasonable attorneys' fees not to exceed twenty per cent (20%) of the damages recovered herein, and

(e) Such other and further relief as to the Court may seem just and proper.

McCUTCHEN, THOMAS, MATTHEW, GRIF-
FITHS & GREENE,

CROWELL, ROUSE & VARIAN,
Attorneys for Plaintiff, Todd
Shipyards Corporation.

[Endorsed]: Filed April 2, 1958.

[Endorsed]: Filed December 12, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
APOSTLES ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify that the accompanying documents numbered from 1 to 107, inclusive, are the originals filed in the above-entitled case and constitute the Apostles on Appeal herein as designated.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of December, 1958.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ J. P. WELSH,
Deputy Clerk.

[Endorsed]: No. 16295. United States Court of Appeals for the Ninth Circuit. Todd Shipyards Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: December 15, 1958.

Docketed: December 19, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16,295

TODD SHIPYARDS CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

Appellant Todd Shipyards Corporation intends to rely on the following points in the above-entitled appeal:

1. Appellee, the United States of America, was not the owner of the "Trojan" (ex "Jeanny") at the time the casualty occurred on January 29, 1957, or at the time it filed the petition herein and cannot limit its liability under the Acts of Congress providing for limitation of liability of shipowners (46 U.S.C., Sec. 183, et seq.; Rev. Stat. 4283, et seq., August 29, 1935, as amended and supplemented).

2. The said Acts of Congress do not permit a shipowner to limit its liability to zero amount by means of a voluntary sale of all its interest in a ship prior to the casualty for which limitation is sought.

3. The liability in respect to which the appellee seeks limitation of liability is not a liability which

falls within the policy and purview of the said Acts of Congress.

4. The District Court does not have jurisdiction of the appellee's Petition for Exoneration from or Limitation of Liability and it should be dismissed.

5. The Restraining Order and Order Directing Issuance of Monition, dated and filed May 2, 1958, should be dissolved, set aside and vacated, particularly as said order enjoined and restrained prosecution by appellant of the following proceedings:

(a) Petition of Todd Shipyards Corporation to implead United States, in No. 27543, in admiralty, formerly No. 27506.

(b) Libel of Todd Shipyards Corporation vs. United States of America, No. 27702, in admiralty.

(c) Complaint of Todd Shipyards Corporation vs. United States of America, Civil No. 37181.

Dated: February 26, 1959.

/s/ McCUTCHEN, DOYLE,
BROWN & ENERSEN,

/s/ RUSSELL A. MACKEY,

/s/ BRYANT K. ZIMMERMAN,

/s/ CROWELL, ROUSE &
VARIAN,

Attorneys for Appellant.

[Endorsed]: Filed March 3, 1959.

In the United States Court of Appeals
for the Ninth Circuit

No. 16,295

TODD SHIPYARDS CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION AND DESIGNATION OF
RECORD MATERIAL TO APPEAL

It Is Hereby Stipulated:

1. That, subject to paragraph 3 hereof, the following constitutes all of the record which is material to the consideration of the above-entitled appeal:

[Items from (a) to (bb) are not listed because already printed in transcript.]

2. That the claims and answers designated as material to the consideration of this appeal are representative of all of the claims and answers filed in the District Court and that no other claims or answers contain allegations concerning the grounds of liability of the United States which are materially different from those contained in the said claims and answers.

3. That the foregoing shall be without prejudice to the printing, by either party, of additional por-

tions of the record as appendices to their briefs, should such portions be made to appear material to the consideration of this appeal.

McCUTCHEN, DOYLE,
BROWN & ENERSEN,
/s/ RUSSELL A. MACKEY,
/s/ BRYANT K. ZIMMERMAN,
CROWELL, ROUSE &
VARIAN,
Attorneys for Appellant.

ROBERT H. SCHNACKE,
United States Attorney;
/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General;

/s/ GRAYDON S. STARING,
Attorney, Admiralty and Shipping Section, Department of Justice, Attorneys for Appellee, United States of America.

[Endorsed]: Filed March 3, 1959.

No. 16,295

In the

United States Court of Appeals

For the Ninth Circuit

TODD SHIPYARDS CORPORATION,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING
on Behalf of
TODD SHIPYARDS CORPORATION,
Claimant-Appellant

McCUTCHEEN, DOYLE, BROWN &
ENERSEN

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*Proctors for Todd Shipyards
Corporation,
Claimant-Appellant*

FILED

FEB 12 1960

FRANK H. SCHMID, CLERK



In the
United States Court of Appeals
For the Ninth Circuit

TODD SHIPYARDS CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING
on Behalf of
TODD SHIPYARDS CORPORATION,
Claimant-Appellant

*To: The Honorable William E. Orr and Oliver D. Hamlin,
Jr., Circuit Judges, and William J. Jameson, District
Judge:*

I.

INTRODUCTORY STATEMENT

This appeal by Todd Shipyards Corporation was from an order entered in the District Court denying a motion by Todd to (a) dismiss as to Todd the petition of the United

States, as "Owner" of the *S/T Trojan* (ex *Jeanny*), for limitation of liability against claims growing out of the explosions and fire which occurred on board the vessel on January 29, 1957, and (b) to vacate and dissolve as to Todd the order entered concurrently with the filing of the petition restraining and enjoining the further prosecution of pending suits against the Government.

At the time the disaster occurred, and also when the Government's petition was filed, the Government did not own the *Trojan* or the contaminated oil on board and had no relationship to either the vessel or the oil as owner. On the contrary, at the time of this accident it was a former owner-vendor, having sold and physically transferred its interest therein to Sheffield Tankers Corporation on December 26, 1956.

The District Judge held that the Government qualified "as owner" under the Acts of Congress limiting the liability of shipowners, *and that the asserted liability of the Government for negligent breach of a "Vendor's or Seller's warranty" with respect to the separate sale and delivery of bunker oil on board the vessel was a liability subject to limitation.*

II.

REASONS FOR REHEARING

At the argument of the appeal, counsel for the United States conceded for the first time that a vendor's liability is not subject to limitation under the Limitation of Liability statutes. Mr. Colby stated flatly and unequivocally that the limitation statutes have nothing to do with vendor's liability. The claim of Todd is based solely on the liability of the Government as vendor. Therefore, as matters now stand, it is conceded that Todd's claim is not subject to limitation.

Even if, as this Court has decided, there is a possibility of *other* claims being asserted which are subject to limitation, this cannot affect Todd's claim, which is not subject to limitation. This Court indicated in its opinion that the questions presented by Todd's motion to dismiss the Government's limitation petition could best be decided after hearing on the merits—but in view of the Government's concession, no such questions remain as to Todd's claim.

Todd's motion in the District Court (R. 105, 106) asked that the Restraining Order and Order Directing Issuance of Monition, dated and filed May 2, 1958, be vacated (R. 14). Since Todd's claim is not subject to limitation, it is entitled to that relief, even if the Government's petition for limitation is allowed to stand.

The need for an order of this Court directing that the Restraining Order be lifted is particularly clear, in view of the statement by Government counsel that a claim based on vendor's liability probably cannot even be *proved* in the Government's limitation proceeding. In other words, Todd cannot assert its claim against the Government unless the Restraining Order is lifted to permit Todd to prosecute its separate suits.

In denying Todd's motion below, the District Court indicated its view that a vendor's liability *was* subject to limitation—a view which the Government now concedes is not correct. (See Judge Wollenberg's opinion, R. 107-113, especially at the top of 112.) Under the circumstances, it is imperative that the order of this Court direct that the Restraining Order be lifted and that Todd be permitted to proceed with its separate suits based on vendor's liability.

III.

CONCLUSION

Appellant Todd Shipyards Corporation requests that a rehearing be granted or that the Court enter its order and judgment directing the District Court to dissolve, set aside and vacate the said Restraining Order, insofar as it affects Todd Shipyards Corporation.

Dated: February 12, 1960.

Respectfully submitted,

McCUTCHEEN, DOYLE, BROWN & ENERSEN
RUSSELL A. MACKEY
BRYANT K. ZIMMERMAN
CROWELL, ROUSE & VARIAN

*Proctors for Todd Shipyards
Corporation, Claimant-Appellant*

Certificate of Counsel

BRYANT K. ZIMMERMAN, of counsel for Todd Shipyards Corporation, petitioner, hereby certifies that in his judgment the foregoing Petition for Rehearing is well founded and that the said Petition is not interposed for delay.

Dated: February 12, 1960.

BRYANT K. ZIMMERMAN

No. 16,295

IN THE

United States Court of Appeals
For the Ninth Circuit

TODD SHIPYARDS CORPORATION,	}
<i>Appellant,</i>	
VS.	
UNITED STATES OF AMERICA,	}
<i>Appellee.</i>	

APPELLEE'S ANSWER TO
APPELLANT'S PETITION FOR A REHEARING.

GEORGE COCHRAN DOUB,
Assistant Attorney General,
LYNN J. GILLARD,
United States Attorney,
SAMUEL D. SLADE,
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
GRAYDON S. STARING,
Attorneys, Department of Justice,
Attorneys for Appellee.

FILED
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Table of Authorities Cited

Cases	Page
Great Lakes Transit Corp., Petition of, 63 F. 2d 849, 1933 A.M.C. 1019 (6th Cir.)	3
Higa v. Transocean Airlines, 230 F. 2d 780, 1956 A.M.C. 122 (9th Cir.)	5
J. Ray McDermott & Co. v. Hunt Oil Co., 262 F. 2d 127, 1959 A.M.C. 384 (5th Cir.)	3
Mitchell v. Greenough, 100 F. 2d 1006 (9th Cir. 1939)	5

Statutes

Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 <i>et seq.</i>	5
Public Vessels Act of Mar. 3, 1925, c. 428, 43 Stat. 1112 (as amended, 46 U.S.C. §781 <i>et seq.</i>)	4
Suits in Admiralty Act of Mar. 9, 1920, c. 95, 41 Stat. 525 (as amended, 46 U.S.C. §741 <i>et seq.</i>)	4
Tucker Act, 28 U.S.C. §1346(a)	5

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TODD SHIPYARDS CORPORATION,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**APPELLEE'S ANSWER TO
APPELLANT'S PETITION FOR A REHEARING.**

To the Honorable William E. Orr and Oliver D. Hamlin, Jr., Circuit Judges, and William J. Jameson, District Judge:

Appellant's Petition for Rehearing proceeds, somewhat disingenuously, we believe, from erroneous assumptions about the position of Appellee and the ruling of the Court to the erroneous conclusion that this Court should now go outside the scope of this appeal to grant a motion for action by the District Court which that Court itself has never yet been asked to take.

Appellant is quite incorrect in stating that "it is conceded that Todd's claim is not subject to limita-

tion" (Pet. for Rehearing 2). On the contrary, the Government's Petition for Exoneration from or Limitation of Liability, in Article X (R. 7), alleges that Todd's claim against the United States is "on the basis of alleged acts and failures to act of Petitioner as owner of the TROJAN (ex JEANNY)", and Todd's Answer admits this (R. 30). Todd, in its Petition to Implead (Art. XII, R. 129), Libel (Art. XII, R. 139) and Complaint (Para. XI, R. 149) and even in its Claim (Art. X, R. 23-24), flatly charges the Government with "fault and negligence" through its "employees having custody, possession, supervision and control over the [TROJAN]".

Both in the District Court and on appeal it has been common ground to the parties that Todd was claiming on two theories: (1) alleged fault and negligence of the United States, committed by its employees, as owner of the JEANNY (now TROJAN) prior to her sale, and (2) alleged fault and breach of warranty of the United States, committed by its employees, as vendor in selling the TROJAN with her stores and fuel aboard. Todd contended that its mere assertion of its claim on its additional theory No. 2 precluded the United States from limitation of liability against Todd's and others' claims on Theory No. 1. But the Court below recognized the character of Todd's claim against the United States as owner. Thus in its order, when it referred (R. 112) to the possibility of claims clearly subject to limitation it did not exclude Todd's claim; it was surely not referring to mere speculative or conjectural claims

arising out of some other circumstances than those in suit, and there was no basis upon which it could have drawn any distinction, if it had tried, so far as limitation is concerned, between the pleadings of Todd and those of the many other claimants who had filed their claims before the decree of default.

The District Court correctly chose to follow the course indicated by *Petition of Great Lakes Transit Corp.*, 63 F. 2d 849, 1933 A.M.C. 1019 (6th Cir.) and *J. Ray McDermott & Co. v. Hunt Oil Co.*, 262 F. 2d 127, 1959 A.M.C. 384 (5th Cir.), recognizing that the character of disputed claims is not to be ultimately determined by the pleadings or by epithets applied by the claimants but by the facts which may actually be proved upon trial. It is immaterial whether Todd may also make a claim based upon its theory of an alleged "vendor's liability" as distinct from shipowner's liability which is subject to limitation, and this the District Court recognized in saying that the availability of limitation proceedings could not be avoided "merely by the form of the pleadings or the theory of the claim asserted" (R. 113). This case has always concerned the claims of Todd as presented by its pleadings and never the abstract question of the relationship of limitation to a claim based upon a vendor's warranty in a contract of sale. Todd's attempt, in argument, to characterize its claim as one upon a vendor's warranty has never been concurred in by the Government nor endorsed by the courts.

Todd is unwarranted in assuming that its claim can be excluded from those to which this Court was re-

ferring when it said in its opinion of January 15, 1960 that "there is a possibility of claims being asserted in this cause which are clearly subject to limitation". Todd attempts to convert this Court's ruling into a holding that its claim is not subject to limitation by inserting the italicized word "other" into its paraphrase of this Court's opinion (Pet. for Rehearing 3). The District Court had clearly understood that Todd's claim was pleaded as a claim for liability as an owner and we suggest that there is nothing in this Court's affirmance to support the exclusion of Todd's claim, at the pleading stage, from those claims subject to limitation.

Any sincere and practical effort of Appellant to proceed exclusively upon the non-maritime contract of sale, for breach of warranty, upon a vendor's liability theory, as Todd implies that it would like to do, would have to be accompanied, at the very least, by measures to eliminate its charges against the United States as shipowner, not merely from current arguments but from the pleadings, by the striking of its Claim and Answer in this cause and by the dismissal of its Petition to Implead, Libel and Complaint, previously filed.¹ All this Appellant makes no offer to do,

¹If Todd is serious about restricting its claim to one of "vendor's liability" and asserting that it is not subject to limitation, its obvious first step is to dismiss its own claim in this limitation proceeding. In its Petition to Implead (R. 124) and Libel (R. 134), Todd relies for jurisdiction upon the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525 (as amended, 46 U.S.C. §741 *et seq.*) and the Public Vessels Act of March 3, 1925, c. 428, 43 Stat. 1112 (as amended, 46 U.S.C. §781 *et seq.*). Since, in the present context, the United States could only be sued under these acts as the owner of the vessel and since the non-maritime con-

let alone suggest how all this might appropriately be accomplished in this appellate Court. Of course the appropriate forum for such action is the District Court, which has before it all of the causes affected. But no such motion as Appellant now makes to this Court in the guise of a Petition for Rehearing has ever been made below, where the entire thrust of Appellant's motion was against the jurisdiction of the District Court to entertain the limitation proceeding in its entirety.² We are at a loss to understand why this Court should be asked to transact District Court business which has never been presented to the District Court. The use of a petition for rehearing to enlarge the scope of an appeal in this manner is improper. *Higa v. Transocean Airlines*, 230 F. 2d 780, 1956 A.M.C. 122 (9th Cir.), *Mitchell v. Greenough*, 100 F. 2d 1006 (9th Cir. 1939).

tract of sale is not of admiralty jurisdiction anyway, Todd should dismiss its Petition to Implead and its separate Libel. Finally, it should also dismiss its Complaint (R. 144) which relies for jurisdiction upon the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 *et seq.*, since a claim "arising out of . . . misrepresentation" is barred under that Act (see Brief for Appellee, p. 31, note 46) and a contract claim would manifestly not fall within the Act. Appellant has not pleaded a case under the Tucker Act, 28 U.S.C. §1346(a) in any of its actions yet filed.

²Appellant's statement in its Petition for Rehearing (pp. 1-2) that its motion below was to dismiss the Petition and vacate the restraining order "as to Todd" should not mislead anyone into supposing that its motion below was limited to anything less than complete dismissal of the action and vacation of the order as to all parties.

CONCLUSION.

For the foregoing reasons we submit that Appellant's Petition for Rehearing should be denied.

Dated, San Francisco, California,
February 17, 1960.

Respectfully submitted,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

LYNN J. GILLARD,
United States Attorney,

SAMUEL D. SLADE,
LEAVENWORTH COLBY,

KEITH R. FERGUSON,
GRAYDON S. STARING,
Attorneys, Department of Justice,
Attorneys for Appellee.

No. 16,295

In the
United States Court of Appeals
For the Ninth Circuit

TODD SHIPYARDS CORPORATION,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appellant's Reply to Appellee's Answer to
Petition for Rehearing**

McCUTCHEN, DOYLE, BROWN &
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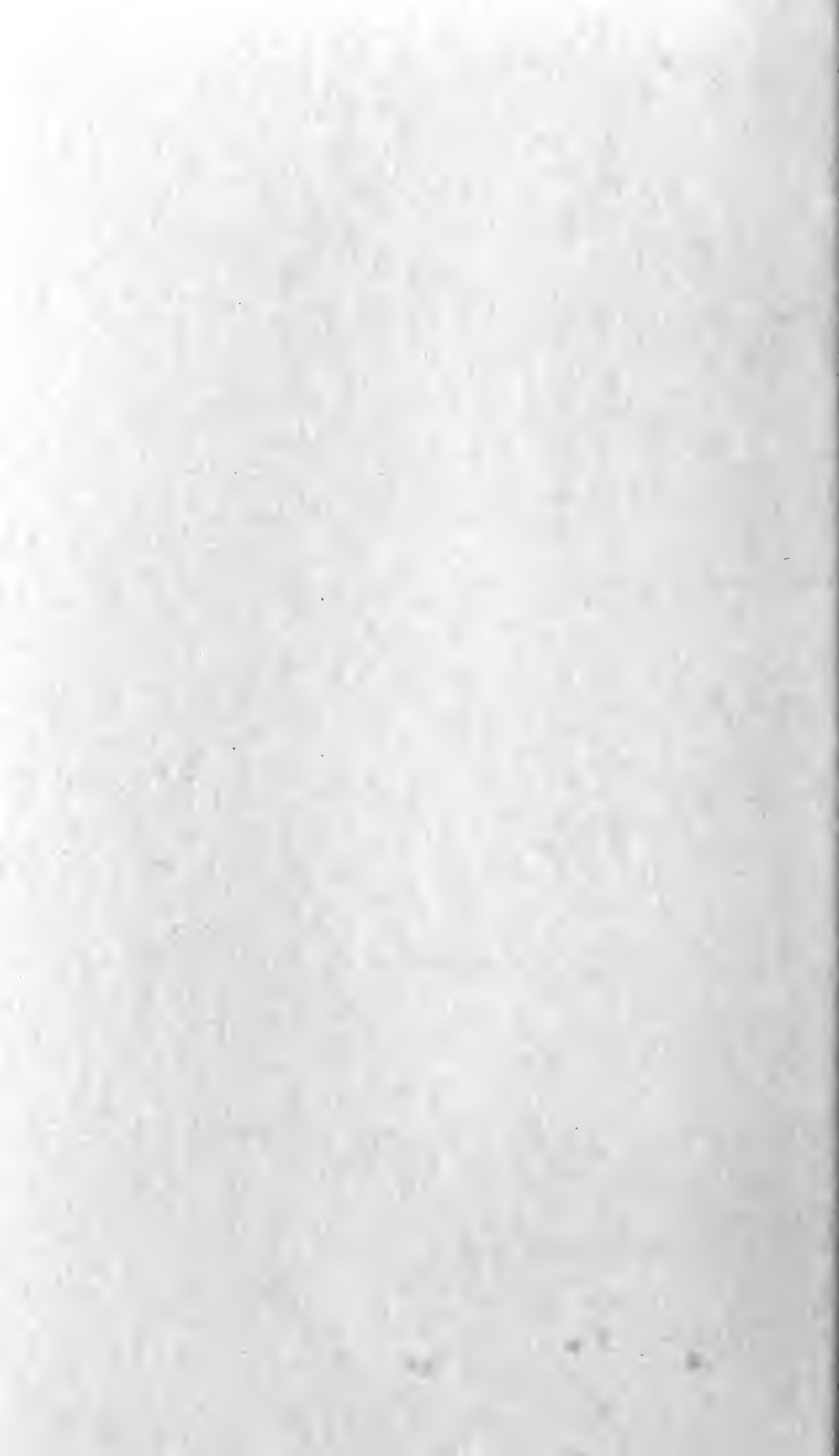
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*Proctors for Todd Shipyards
Corporation,
Claimant-Appellant*

FILED

FEB 25 1960

FRANK H. SCHMID, C



No. 16,295

In the
United States Court of Appeals
For the Ninth Circuit

TODD SHIPYARDS CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appellant's Reply to Appellee's Answer to
Petition for Rehearing**

*To: The Honorable William E. Orr and Oliver D. Hamlin,
Jr., Circuit Judges, and William J. Jameson, District
Judge:*

Appellee's Answer to Appellant's Petition for a Rehearing contains three serious errors which require correction:

1. It is said at page 2 that "it has been common ground to the parties that Todd was claiming * * * negligence of the United States * * * as owner of the *Jeanny* (now

Trojan) prior to her sale * * *.” This is not so. Todd’s claim has always been based solely upon the Government’s liability as vendor. (See, for example, the opinion of the District Court, R. 107, 109, 111-112).

2. The Government attempts to distort Todd’s claim of vendor’s liability into a claim “exclusively upon the non-maritime contract of sale, for breach of warranty” (Answer, p. 4). It then suggests that Todd’s proper course is to dismiss its claim in the limitation proceeding — as well as its other suits, which have been stayed by the Restraining Order! This amazing suggestion overlooks the fact that Todd *cannot* assert its claim of vendor’s liability in any other proceeding until the Restraining Order is lifted to permit it. That Order will not be lifted so long as the District Court remains of the view that a claim for vendor’s liability must be asserted in the limitation proceeding. Clearly an order of this Court is required.

3. The Government then contends that the request for lifting the Restraining Order “has never been presented to the District Court” (Answer, p. 5). This is plainly not so. The motion below specifically asked that relief. The Points on Appeal (R. 155-156, Point 5) and Briefs (See Opening Brief, pp. 2, 7, 11-12, 30) raised the same point very clearly. Indeed, the very basis for the appeal to this Court was the District Court’s refusal to set aside the Restraining Order. (See Opening Brief, Jurisdictional Statement, p. 3.)

Since the Government has now conceded that a claim based on vendor’s liability is not subject to limitation, there can be no reasonable ground for its continuing to try to place procedural blocks in the way of proper assertion of that claim. The claim should be asserted outside of the limitation proceeding. To do this will require that the Dis-

trict Court's Restraining Order be lifted. This Court should enter an appropriate Order to that end.

Dated: February 24, 1960.

Respectfully submitted,

McCutchen, Doyle, Brown & Enersen
Russell A. Mackey
Bryant K. Zimmerman
Crowell, Rouse & Varian

*Proctors for Todd Shipyards
Corporation, Claimant-Appellant*

No. 16,298 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

VIRGINIA J. KING, as Administratrix of
the Estate of John Elvins King,
Appellant,

VS.

PAN AMERICAN WORLD AIRWAYS, a cor-
poration,
Appellee.

BRIEF FOR APPELLANT.

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WM. SHANNON PARRISH,
JOHN B. LEWIS,
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FILED

APR - 7 1959

PAUL P. O'BRIEN, C.



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the Estate of John Elvins King,

Appellant,

vs.

PAN AMERICAN WORLD AIRWAYS, a cor-
poration,

Appellee.

BRIEF FOR APPELLANT.

The appeal is by the libelant Virginia J. King, as administratrix, from an adverse decree in a suit in admiralty to recover damages for wrongful death occurring on the high seas.

STATEMENT OF JURISDICTION.

Paragraphs V-VIII of the libel in the court below alleged that the death of libelant's intestate and husband, John Elvins King, was caused by the wrongful act or neglect of the respondent, Pan American World

Airways, occurring on the high seas between Honolulu, Hawaii, and continental United States beyond a marine league from shore. T. 4-6. The death of the High Seas Act (41 Stat. 537 (1920), 46 U.S.C. §§761-767). T. 6. Jurisdiction of the District Court is therefore sustained by 28 U.S.C. §1333.

The final decree of the District Court was entered October 22, 1958. T. 49. Notice of appeal to this court was filed November 14, 1958. T. 49-50. The appeal was timely. 28 U.S.C. §2107. Jurisdiction of this court to review the final decree of the District Court is therefore sustained by 28 U.S.C. §§1291, 1294.

STATEMENT OF THE CASE.

The libelant alleged in the libel that the death of her husband, John Elvins King, occurred November 8, 1957, when an airplane owned and operated by respondent Pan American World Airways, and on which Mr. King was employed, fell and crashed on the high seas between territorial Hawaii and continental United States beyond a marine league from shore. T. 4-5. His death was ascribed to the wrongful acts and neglect of respondent. T. 5-6. The libelant also alleged that she was the duly appointed and acting administratrix of her husband's estate (T. 4) and that his heirs at law, consisting of herself, three daughters, and a son, had been damaged in the sum of \$275,000 by reason of his death, for which sum judgment was prayed (T. 6-8). The libel was filed February 3, 1958. T. 8.

Respondent's answer admitted that Mr. King's death occurred on the high seas beyond a marine league from shore. T. 9. A special defense was that libelant was barred from maintaining the action by reason of the California Workmen's Compensation Act and sections 3600 and 3601 of the California Labor Code. T. 9-10. The answer was filed March 27, 1958. T. 12.

A hybrid motion labeled Exceptions to Libel and Motion for Summary Judgment was filed by respondent on May 21, 1958. T. 31. The ground of the motion was that "the pleadings and the Stipulation of Facts filed herein demonstrate that on the basis of the undisputed facts, Respondent Pan American World Airways, Inc. is entitled to judgment as a matter of law". T. 14.

The Stipulation of Facts accompanying the motion (T. 15-19) recited that respondent was a New York corporation, and decedent and libelant residents of California (T. 16); that decedent was continuously employed by the respondent from October 12, 1942, to December 31, 1947, and continuously based at San Francisco (T. 16); that on May 1, 1957, decedent became Flight Supervisor for respondent at the San Francisco Airport, and his duties required him to fly approximately 600 flying hours during a yearly employment of approximately 2080 hours (T. 17); that at and prior to November 8, 1957, respondent carried California Workmen's Compensation with Travelers Insurance Company (T. 17); that "decedent, John Elvins King, left the San Francisco International

Airport, South San Francisco, California, alive on November 8, 1957, on board Pan American Flight No. 7, the first stop of which was Territory of Hawaii, U.S.A. At the time of his death, decedent, John Elvins King, was performing services growing out of and incident to his employment, and was acting within the course of his employment, and his death was not caused by intoxication. On November 8, 1957, the airplane entered the water at a point between San Francisco, California, and the Territory of Hawaii (Hawaiian Islands), more than one marine league from any shore line. Following said event John Elvins King was dead. The parties do not stipulate as to whether he died in the air or in the water" (T. 17-18); that an application filed by respondent and its said workmen's compensation insurance carrier to determine liability for death benefit and burial expenses under the California Workmen's Compensation Act was opposed by libelant and the jurisdiction of the Industrial Accident Commission contested (T. 18); that libelant did not appear voluntarily before the Commission or consent to its jurisdiction (T. 18); that the application resulted in a death benefit award (T. 18).

Annexed to the stipulation were copies of the application (T. 20-22), the award (T. 23-25), and the referee's report (T. 26-31).

The stipulation expressly provided (T. 19):

"Entry into this stipulation shall not be deemed an admission by either party as to the relevancy or materiality of any of the facts stipulated to,

and the parties reserve their rights in this regard."

An opinion and order of the District Court granting the motion for summary judgment was filed September 30, 1958. T. 31-38. It is reported as *King v. Pan American World Airways*, 166 F. Supp. 136.

The opinion began (T. 31):

"This cause presents the novel question whether the California Workmen's Compensation Act precludes an action for wrongful death under the Federal Death on the High Seas Act by the administratrix of the estate of an airline employee who in the course of his employment was killed in the crash of an airliner on the high seas."

And the opinion ended (T. 37-38):

"The Death on the High Seas Act was enacted to fill a void in the maritime law and provided an admiralty remedy for wrongful death where none had existed before. There is no indication that the Congress intended that this statutory remedy for death should have any different relation to the State Compensation Laws than the pre-existing non-statutory admiralty remedies for personal injury. Since the Supreme Court has ruled that State Compensation Acts, designed to afford an exclusive remedy to injured employees, abrogate the otherwise existing admiralty remedy for personal injuries in situations where the application of the state act does not interfere with the uniformity of the maritime law, it is reasonable to conclude that the Compensation Acts similarly abrogate the admiralty remedy for

wrongful death accorded by the Death on the High Seas Act.”

The final decree, entered October 22, 1958, adjudged that libelant, as administratrix, take nothing under the libel, and that respondent have summary judgment against libelant. T. 48-49.

SPECIFICATION OF ERRORS.

1. The District Court erred in granting the motion of respondent for summary judgment.
2. The District Court erred in decreeing that respondent have summary judgment against libelant.
3. The District Court erred in decreeing that libelant take nothing under the libel.
4. The District Court erred in decreeing that state compensation acts have abrogated the admiralty remedy for wrongful death accorded by the Death on the High Seas Act.
5. The final decree is against law.

ARGUMENT.

1. **THE SUMMARY JUDGMENT FOR RESPONDENT SHOULD BE REVERSED FOR THE REASON THAT THE FEDERAL DEATH ON THE HIGH SEAS ACT CONFERRED UPON LIBELANT A CAUSE OF ACTION IN ADMIRALTY AND EXCLUDED APPLICATION OF STATE WORKMEN'S COMPENSATION LAWS.**
Specification of Errors Nos. 1, 2, 3, 4, 5.

The Death on the High Seas Act was enacted in 1920. 41 Stat. 537, 46 U.S.C., §§761-767. Sections 1

and 2 of the Act (41 Stat. 537, U.S.C., §§761, 762) provide:

“Sec. 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent’s wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.” (46 U.S.C., §761.)

“Sec. 2. The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.” (46 U.S.C., §762.)

The history of the act was reviewed by this court in *Higa v. Transocean Lines*, 9 Cir. 1955, 230 F. 2d 780, where the administrator of a passenger killed in an airplane crash on the high seas sought recovery of damages in a common law civil action. In holding that the action was properly dismissed because brought on the wrong side of the court, it was said, at page 785:

“Here, however, the Death on the High Seas Act creates the right to recover for wrongful

death and designates not only the federal court for its enforcement, but a particular jurisdiction of that court. The right is a matter of federal law where state courts would have no special competence. There is more here that 'the grant of jurisdiction, of itself * * *' which indicates that jurisdiction was intended to be exclusive."

And at page 786, the court added:

"Our disposition of this case makes unnecessary the determination whether the High Seas Act applies to airplanes which are not in any way water navigating vessels."

If doubt existed in this circuit as to the applicability of the Death on the High Seas Act to airplane crashes on the high seas it was dispelled by the decision in *Trihey v. Transocean Air Lines, Inc.*, 9 Cir. 1958, 255 F. 2d 824. In the second circuit the applicability of the Act to airplane crashes on the high seas or wrongful death occurring above, on, or in the high seas was expressly upheld in *D'Aleman v. Pan American World Airways*, 259 F. 2d 493. Commencing at page 494, the court said:

"The sole appellate point presented as to the first cause of action is whether the trial court should have heard this cause of action in admiralty. * * *

(495) The purpose of the Act was to create a uniform cause of action where none existed before and which arose beyond the territorial limits of the United States or any State thereof. When the Act was passed (March 30, 1920) the only feasible way to be carried beyond the jurisdiction

of any law applicable to wrongful death was by ship. However, with the development of the transoceanic airship the same extraterritorial situation was made possible in the air. The Act was designed to create a cause of action in an area not theretofore under the jurisdiction of any court. The means of transportation into the area is of no importance. The statutory expression 'on the high seas' should be capable of expansion to, under, or, over, as scientific advances change the methods of travel. The law would indeed be static if the identical location three thousand feet above in a plane were not. Nor should the plane have to crash into the sea to bring the death within the Act any more than a ship should have to sink as a prerequisite.

The reasons for holding that the Act should apply to air travel are well stated in *Choy v. Pan American Airways Co.*, 1941 A.M.C. 483, at pages 484-485 (S.D. N.Y., Clancy, J.). * * *

The same conclusion was reached in *Noel v. Linea Aeropostal Venezolana*, . . . 154 F.Supp. 162, at page 163 (Cashin, J.), affirmed 2 Cir. 247 F. 2d 677, in which he said:

'Neither authority * * *, the language of the Statute nor the dictates of common sense sustain a holding that the fulfillment of the jurisdictional requirements of the Federal Death on the High Seas Act is to be governed by the determination of such an elusive fact as whether a person died above, on or in the sea. * * *'

The facts of the case now before the court make a direct ruling on the question appropriate. To give to passengers on ships protection of the Act

and deny similar rights to passengers in the air (496) would amount to unjustifiable and highly technical determination.

(1) We, therefore, now hold that the Death on the High Seas Act grants a right of action in admiralty for death caused by wrongful act, neglect or default occurring in the air space over the high seas and that the trial court properly heard the case in admiralty.”

And in a concurring opinion by Waterman, C.J., it was said at page 496:

“Further, I believe it pertinent to point out that the Congress in enacting 46 U.S.C. §761 superseded state created causes of action for wrongful death arising from events occurring on the high seas. *Wilson v. Transocean Airlines*, D.C.N.D.Cal. 1954, 121 F. Supp. 85. And see *Echavarria v. Atlantic & Caribbean Steam Nav. Co.*, D.C.E.D.N.Y. 1935, 10 F. Supp. 677.”

The rule thus referred to by Judge Waterman has equal application to state workmen's compensation acts. Thus in Comment c to Restatement, Conflict of Laws, §401, it is said:

“c. *Effect of Federal Employers' Liability Act or admiralty jurisdiction.* If the case is one which is within the scope of a Federal Employers' Liability Act, *or of admiralty jurisdiction*, the remedy under a State Workmen's Compensation Act cannot be constitutionally allowed in any State of the United States. If the case comes under the Federal Act even though the Act provides no remedy under the circumstances, there

can be remedy under a Workmen's Compensation Act." (Emphasis added.)

And in the leading authority on the subject of workmen's compensation in California it is said (2 Hanna, *The Law of Employee Injuries and Workmen's Compensation*, 488):

"The High Seas Death Act covers the death of any person, *employee or otherwise*, caused by 'wrongful act, neglect or default, occurring on high seas.' " (Emphasis added.)

The California Workmen's Compensation Act was adopted in 1917. (2 Hanna, *The Law of Employee Injuries and Workmen's Compensation*, 27.) The District Court held in this case that the California Workmen's Compensation Act abrogated or superseded the Death on the High Seas Act. This was manifest error. The reverse was true. The Death on the High Seas Act abrogated or superseded state wrongful death acts, including compensation acts, where death occurred on the high seas.

The District Court therefore erred in granting the motion of respondent for summary judgment, it erred in decreeing that respondent have summary judgment against libelant, it erred in decreeing that libelant take nothing under the libel, it erred in decreeing that state compensation acts have abrogated the admiralty remedy for wrongful death accorded by the Death on the High Seas Act, and its final decree is against law.

CONCLUSION.

Appellant therefore respectfully submits that the summary judgment in favor of respondent should be reversed with directions to the District Court to hear and determine the suit in admiralty.

Dated, San Francisco, California,

April 2, 1959.

JOSEPH EDWARD SMITH,

WM. SHANNON PARRISH,

JOHN B. LEWIS,

SMITH, PARRISH, PADUCK & CLANCY,

HERBERT CHAMBERLIN,

Proctors for Appellant.

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a corporation,
Appellee.

Brief for Appellee

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Appellee.

Brief for Appellee

Preliminary Statement

The instant appeal is by Libelant from the decree of the Court below, granting the motion of Respondent Pan American World Airways, Inc., (hereinafter referred to as "Pan American") for summary judgment.

The motion was made upon the ground that the pleadings and a Stipulation of Facts filed by the parties demonstrated that upon the basis of undisputed facts Pan American was entitled to judgment as a matter of law (Tr. 13-14).

The instant action was commenced by Virginia J. King, Administratrix of the Estate of John Elvins King, in the United States District Court, and was sought to be founded upon the Death on the High Seas Act (Libel, Paragraph VIII, Tr. 6). The Libel (in Paragraph V thereof) alleged that on November 8, 1957 decedent King was employed by Respondent Pan American aboard an airplane owned and operated by Pan American and that while said airplane was in flight "and while said John Elvins King was *within the course and scope of his employment* with Respondent Pan American * * * " (emphasis added) the plane crashed upon the high seas, killing the decedent. The Libel then generally alleged negligence on the part of Pan American and others (Tr. 5), and sought \$275,000 damages for and on behalf of Virginia J. King, Melissa A. King and Richard R. King, as the decedent's surviving widow and children (Libel, Paragraphs XIV and XV, Tr. 7-8).

Pan American's Answer to the Libel, after denying negligence, set up the affirmative defense that the death of decedent King was an industrial accident subject to and governed by the provisions of the California Workmen's Compensation Act, that the remedies afforded by said Act provided the sole and exclusive remedy against the employer, Pan American, and barred the action (Answer, Paragraph IV, Tr. 9-10).

The Stipulation of Facts (Tr. 15-19) shows that the decedent King had been an employee of Pan American for some fifteen years, hired at San Francisco, California, and at the time of his death (and for the last ten years) had been based at Pan American's main base for its Pacific-Alaska division, located at San Francisco International Airport. He held the position of Flight Service Supervisor, in which job he spent much of his time at the San Francisco base, and the remaining working time in in-flight super-

vision and observation of pursers, stewards and stewardesses employed on Pan American aircraft flying in and out of San Francisco, California. He was a resident of California at the time of his death. During the flight in question he was "performing services growing out of and incident to his employment, and was acting within the course of his employment" (Stipulation of Facts, Paragraphs 2-5) Tr. 16-17).

Pan American and its workmen's compensation insurance carrier filed an application before the California State Industrial Accident Commission to determine the liability of Pan American for death benefits and burial expense under the California Workmen's Compensation Act; Libellant Virginia J. King and decedent King's children were made parties to said proceedings. On February 20, 1958, a hearing was had before the Industrial Accident Commission upon said application, at which time Virginia J. King appeared through counsel and contested the jurisdiction of the Industrial Accident Commission. Subsequent to said hearing, the Industrial Accident Commission made its order, making an award in favor of Virginia J. King, Richard R. King and Melissa A. King, of a death benefit in the sum of \$15,000; said award became final (twenty days after issuance) upon April 21, 1958 (Stipulation of Facts, Paragraph 6, Tr. 18-19).

After the hearing of Pan American's motion for summary judgment and the filing of written briefs by both sides, the District Court, the Honorable Louis Goodman, granted the motion and entered the decree now appealed from. At the time of entering the order, Judge Goodman filed a carefully reasoned opinion (reported as *King v. Pan American World Airways*, 1958, 166 Fed. Supp. 136) discussing the issue raised in the case and the reasons why the California Workmen's Compensation Act precluded Libellant's action.

The Relevant Statutes

The relevant statutes are as follows:

- (1) The Death on the High Seas Act (March 30, 1920, c. 111, Sections 1-7, 41 Stat. 537, 46 U.S.C.A. Sections 761-767):

Section 1:

“Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent’s wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.”

* * * * *

Section 7:

“The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.”

- (2) The California Workmen’s Compensation Act (cited as Sections in the California Labor Code):

Section 3600:

“Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death,

in those cases where the following conditions of compensation concur: * * *

Section 3600.5:

“(a) If an employee who has been hired or is regularly employed in this State receives personal injury by accident arising out of and in the course of such employment outside of this State, he, or his dependents in case of his death, shall be entitled to compensation according to the law of this State * * *”

Section 3601:

“Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the employer for the injury or death.”

Section 3706:

“If any employer fails to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, in addition, may bring an action at law against such employer for damages, as if this division did not apply.”

Section 5305:

“The commission has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State. Any such employee or his dependents shall be entitled to the compensation or death benefits provided by this division.”

The Issue in This Case

The issue in this case was well stated by Judge Goodman, at the outset of his opinion, to be:

“* * * whether the California Workmen’s Compensation Act precludes an action for wrongful death under the Federal Death on the High Seas Act by the administratrix of the estate of an airline employee who in the course of his employment was killed in the crash of an airliner on the high seas.” (166 Fed. Supp. at 137)

It was common ground between Libellant and Respondent that the death of decedent King in this case was an industrial injury, arising during the course of his employment as Flight Service Supervisor aboard that certain Pan American airplane which crashed between San Francisco and Honolulu November 8, 1957; that said death was the subject of a proceeding before the Industrial Accident Commission of California; and that the Commission assumed jurisdiction over Libellant’s objection and made a death benefit award to Libellant and the children of said decedent. The issue to be decided by the District Court was whether a further and additional recovery against decedent’s employer might also be had for that industrial injury by the surviving widow and children under the provisions of the Federal Death on the High Seas Act. The District Court held it could not.

Appellant’s Opening Brief Does Not Meet the Only Issue in This Case

As noted, Judge Goodman’s opinion in this case in the District Court clearly stated the issue, and the reasoning by which he reached his conclusion that Pan American was entitled to judgment. In their Opening Brief, however, Appellant’s counsel discuss neither this issue nor the reasoning of the District Court’s opinion, and the authorities

they cite are almost totally irrelevant to the question.

Thus, they cite exactly three cases (other than the District Court opinion in this case) and two treatises. The irrelevancy of the three cases is quickly demonstrated.

Higa v. Transocean Airlines, C.C.A. 9, 1955, 230 Fed. (2d) 780, was a *passenger* case. The issue was whether an action under the Death on the High Seas Act must be brought on the admiralty side of the Federal Court, or whether it could be brought on the law side; the court held that under the language of Section 1 of the Act it must be brought on the admiralty side.

Trihey v. Transocean Air Lines, Inc., C.C.A. 9, 1958, 255 Fed. (2d) 824, likewise was a *passenger* case. The trial court heard the evidence, found no negligence had been shown, and decided in favor of the defendant. The question on appeal was whether this finding was permissible under the evidence; the Court of Appeals held it was, and affirmed.

D'Aleman v. Pan American World Airways, C.C.A. 2, 1958, 259 Fed. (2d) 493, again was a *passenger* case, in which the complaint alleged the decedent had been so frightened by an incident that occurred in flight over the ocean that several days later, after reaching land, he died. The complaint had two counts, the first under the Death on the High Seas Act, and the second under the Virginia wrongful death act. On the first count, the trial court itself heard the case, found no negligence had been shown, and decided in favor of the defendant. The second count was tried to a jury, which likewise decided in favor of defendant. On appeal, the sole question as to the first count was whether it should have been tried to a jury, instead of to the court in admiralty. The appeal as to the second count concerned only alleged erroneous rulings on the admissibility of evidence. The Court of Appeals affirmed as to both counts, holding that the first count had properly been tried in

admiralty to the court on the theory that the Death on the High Seas Act governed occurrences during flight over the ocean, as well as upon the ocean, and that actions thereunder must be brought in admiralty. A brief concurring opinion by Judge Waterman added the view (in which his fellow Judges apparently did not join) that "the Congress in enacting 46 U.S.C.A. § 761 superseded the State created causes of action for wrongful death arising from events occurring on the high seas" (259 Fed. (2d) 469) citing in this connection *Wilson v. Transocean*, 121 Fed. Supp. 85.

It seems obvious that (save for the summary reference in Judge Waterman's concurring opinion to the *Wilson* case, discussed below at pages 30-33 of this Brief) that none of these cases is remotely in point, factually or legally.

The two treatise references are equally not in point, as will be demonstrated on pages 34-35 of this Brief.

We are thus left in the position, as Appellee, with the duty to respond to Appellant's case, but with little or nothing to respond to. Since this is our one opportunity to present written argument, however, we must anticipate and answer such arguments as Appellant's counsel may present in their Closing Brief. We anticipate that there Appellant's counsel will cite the case of *Fernandez v. Linea Aero Postal Venezolana*, U.S.D.C., S.D.N.Y., 1957, 156 Fed. Supp. 94,¹ and therefore now discuss it briefly.

The *Fernandez* case involved the death of a stewardess in an airplane crash at sea, and held a claim could be founded upon the Death on the High Seas Act; the case therefore superficially seems factually in point. The case is legally not in point at all, however, since it in no way dealt with or even considered the question whether such a remedy, if otherwise applicable, would be barred by a workmen's com-

1. Inasmuch as they specifically cited this case in the District Court.

pensation statute. The only issue before the court was instead the completely different question, presented on a preliminary motion, whether the United States Death on the High Seas Act applied in the case of a *foreign* airplane, with a *foreign* owner and crew, where the accident occurred outside the United States. (It is to be noted that the defendant was a Venezuelan airline, Linea Aero Postal Venezolana, and presumably so was the crew; the deceased stewardess in question was named Elvia V. Varela and her personal representatives were named Fernandez and Varela.) The District Judge held the United States Act *did* apply (a rather doubtful result in view of *Lauritzen v. Larsen*, 1953, 345 U.S. 571, 97 L.Ed 1254). Quite possibly the reason the effect of a workmen's compensation act remedy was neither posed nor considered is that Venezuela has no such act applicable with respect to such accidents.

Why Appellant's counsel in their Opening Brief chose to avoid the issue can only be guessed at. We must point out, however, that it was their burden, as Appellant, to demonstrate that the ruling of the District Court from which they appeal was erroneous. Their failure to come to grips with the reasoning of the trial court, or even to try to meet the issue, simply acknowledges, we suggest, the fundamental weakness of Appellant's position.

The California Workmen's Compensation Act: Its Extra-Territorial Jurisdiction and Exclusive Remedy Provisions

The California Workmen's Compensation Act is contained in Sections 3201 through 6002 of the California Labor Code. It applies to all injuries (including death) arising out of an employee's employment (Labor Code Section 3600), both where the injury occurs within the State of California, and also where the injury occurs outside the territorial boundaries of the State of California, if the contract of employment was entered into in California or

if the employee was regularly employed in California (Labor Code Sections 3600.5 and 5305).² As the Court is aware, such extra-territorial coverage is common, even customary, in State Workmen's Compensation Acts. Such extra-territorial jurisdiction has been uniformly sustained on the basis of a State's legitimate interest in protecting employees regularly employed within the State and their families from the consequences of industrial accidents. *Alaska Packers v. Industrial Accident Commission*, 1935, 294 U.S. 532, 79 L. Ed. 1044.³ As the Court is undoubtedly

2. Set forth at page 5 of this Brief.

3. The language used by the United States Supreme Court in the case of *Cardillo v. Liberty Mutual Insurance Co.*, 1947, 330 U.S. 469, 91 L.Ed. 1028, sustaining application of the extraterritorial jurisdiction provisions of the District of Columbia workmen's compensation act, is very much in point. In rejecting a challenge to these provisions, the Court said:

"We hold that the jurisdictional objection is without merit in light of these facts. Nothing in the history, the purpose or the language of the Act warrants any limitation which would preclude its application to this case * * *

"Nor does any statutory policy suggest itself to justify the proposed exception. A prime purpose of the Act is to provide residents of the District of Columbia with a practical and expeditious remedy for their industrial accidents *and to place on District of Columbia employers a limited and determinate liability*. See *Bradford Electric Light Co. v. Clapper*, 286 US 145, 159, 76 L. Ed. 1026, 1035, 52 S Ct 571, 82 ALR 696. The District is relatively quite small in area; many employers carrying on business in the District assign some employees to do work outside the geographical boundaries, especially in nearby Virginia and Maryland areas. When such employees reside in the District and are injured while performing those outside assignments, they come within the intent and design of the statute to the same extent as those whose work and injuries occur solely within the District. *In other words, the District's legitimate interest in providing adequate workmen's compensation measures for its residents does not turn on the fortuitous circumstance of the place of their work or injury*. Nor does it vary with the amount or percentage of work performed within the District. Rather it depends upon some substantial connection between the District and the particular employee-employer relationship, a connection which is present in this case." (Emphasis added, 330 U.S. at 475-476.)

aware, thousands of American employees (many of whom were hired in California) now work in foreign countries, Arabia, Iran, India, South America and the like, on various construction and oil projects; these, it is understood by all, are protected as to industrial injuries by the applicable State Workmen's Compensation Act (very often that of California) rather than by Arabian or other "local" law.

Under the California Workmen's Compensation Act the employer is required to "secure" its employees' compensation rights by effecting compensation insurance with an insurance carrier (California Labor Code Section 3706).⁴ Where the conditions and requirements of the Workmen's Compensation Act are present, and provided that the employer has complied with Section 3706 as stated above, the remedies against the employer for injury to or death of an employee are, by the express terms of the Act, made exclusive. The statutory language is found in Labor Code Section 3601 which reads as follows:

"Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in Section 3706, the exclusive remedy against the employer for the injury or death."

As is well known, the Legislature, in enacting the California Workmen's Compensation Act, both extended and contracted the rights of employees against their employer. A comprehensive system of compensation for industrial injuries was provided, without any requirement of proof of fault; on the other hand, all "common law" rights of action by the employee against the employer for fault were expressly abrogated. Each of these two features of the Act is vital to it; each complements the other. Save for

4. Which Pan American did. See Stipulation of Facts, Paragraph (4) (Tr. 17).

the single case where the employer, in violation of law, fails to "secure" compensation for its employees by effecting compensation insurance, the employer, in exchange for imposition of the obligation to pay compensation under the Act, is relieved from any other claims or causes of action by or on behalf of the employee. The exclusive remedy provision of the Act is thus a key and integral part of the statutory scheme; to hold that the exclusive remedy feature of the California Workmen's Compensation Act is inapplicable to a given situation is to hold that the Act in its entirety is inapplicable.

As the Stipulation of Facts states, the Industrial Accident Commission found it had jurisdiction over the death of decedent King, and that the California Workmen's Compensation Act applied. That finding (upon a *contested* issue, see Stipulation of Facts, Paragraph 6, Tr. 18) has become final and is therefore *res judicata*. Libelant is now estopped to deny the jurisdiction of the Industrial Accident Commission or the correctness of its findings, *Sherrer v. Sherrer*, 1948, 334 U.S. 92 L.Ed. 1429. Libelant therefore cannot assert that the California Workmen's Compensation Act is inapplicable, or any proposition tantamount to such an assertion.

The Legal Background of the Law of Airline Industrial Injuries: Congress Has Left the Provision and Regulation of Remedies for Airline Industrial Injuries Wholly to the Respective States. When an Airline Industrial Accident Occurs, the Workmen's Compensation Act of the State of Employment Governs and Controls Over and Against the Wrongful Death Law of the Place of the Accident.

To present the present issue in its proper legal setting, some background concerning the rights and remedies of airline employees against their employers for industrial injuries (including death) is necessary.

There are two fundamental legal propositions of significance here :

(1) There is *no* applicable Federal remedy for industrial injuries of airline employees, either of the Workmen's Compensation or the F.E.L.A. Act kind ;

(2) The applicable *State* Workmen's Compensation remedies do apply, and provide and regulate the remedies of airline employees against their employers with respect to industrial injuries.

It is common knowledge that nowadays commercial airliners fly all over the world, and that the typical trip covers a great distance. As for trips within the United States, almost every flight of a modern passenger airliner crosses one or more State boundaries. Hundreds of flights a week likewise take place between the continental United States and Europe, Asia, Africa and South America. These flights pass over both land and ocean, but are always from a land airport to a land airport (save in the almost vanishing instance of "flying boats").

Due to the interstate and foreign nature of such airplane flights, it is clear, as a theoretical matter, that Congress *could* exercise jurisdiction, under the Constitution, to enact a Federal compensation act applicable to airline employees, comparable to the specific Federal laws enacted as to railroad workers, seamen, longshoremen, and others. It is equally clear, however, as a matter of actual practice, that Congress has seen fit *not* to exercise its potential jurisdiction over airline employees, but has instead left to the States, and solely to the States, the question of the respective rights and remedies of airline employees and their employers for industrial injuries. This is clear, both as a matter of common knowledge and also of authority. Thus, in *Spelar, Administratrix v. American Overseas Air Lines, Inc.*, U.S.D.C., S.D.N.Y., 1947, 80 Fed. Supp. 344, involving

a wrongful death action for the death of a flight engineer killed in an airplane crash in Newfoundland, the court said (at page 347):

“* * * no rule of liability or method of compensation has been established by Congress with respect to personal injuries sustained by employees of airplane carriers engaged in interstate or foreign commerce.”

In view of the importance of air transportation to our modern life, and the specific recognition given the airline industry by Congress in various respects (such as Congressional investigation into overlapping use of the national air lanes by the military services and civilian airlines, and the application of the Railway Labor Act to labor disputes in the airline industry) the complete and utter silence of Congress upon the subject of airline employer-employee rights and remedies in respect to industrial injuries, can only be deemed intentional and deliberate.

In approaching the issue in the present case, therefore, we must bear in mind that, with respect to the *typical* industrial airline injury occurring on land, whether within or without the United States, Congress has provided *no* Federal remedy but has intentionally and knowingly left the field to State regulation and State regulation alone.⁵

The second fundamental proposition to observe, in the field of airline industrial injuries, is that the applicable Workmen's Compensation Act has uniformly been held to govern and control, as against the *lex delicti*, the tort law

5. The fact that Congress has intentionally and knowingly left this area to the States is illustrated by the fact that both in the 84th and 85th Congresses bills were introduced in the House of Representatives, the effect of which would have been to specifically make airline employees subject to the Federal Employers Liability Act and these bills failed even to get out of committee. See H.R. 4831 introduced in the 84th Congress, and H.R. 1044 introduced in the 85th Congress, both by Congressman Zelenko.

of the place of the injury which would otherwise normally apply. The applicable Workmen's Compensation Act has been held to govern because that is the law with relation to which the parties contracted, and that is the law which affords at once a speedy and certain remedy to the injured worker (or, in the case of death, to his family) and thus protects both the interest of the worker and the State. The cases are uniform to this effect, whether the crash causing the injury occurs within the United States or upon overseas territory.

First, as to crashes within the United States: In *Willingham v. Eastern Air Lines*, C.C.A. 2, 1952, 199 Fed. (2d) 623, suit was brought in New York for the death of an airplane pilot killed in a crash in Maryland. The widow had claimed and received compensation under the Georgia Workmen's Compensation Act. The court held that the Georgia Workmen's Compensation Act applied and that the wrongful death action based upon Maryland law was barred by the exclusive remedy provisions of the Georgia Act.

In *Severson v. Hanford Tri-State Air Line, Inc.*, C.C.A. 8, 1939, 105 Fed. (2d) 622, the plaintiff was a co-pilot on a commercial airplane flying between Minnesota and Illinois, and was injured in a crash in *Wisconsin*, allegedly due to his employer's negligence. He brought a common law action for damages based on negligence against the employer. The trial court directed a verdict for defendant on the ground that plaintiff's sole remedy was under the *Minnesota* Workmen's Compensation Act, and the Circuit Court of Appeals affirmed, stating:

"It is conceded that plaintiff suffered an accidental injury arising out of and in the course of his employment. The Workmen's Compensation Acts of the various states were enacted for the purpose of requiring

industry to bear a part of the burden occasioned by accidental injuries to its employees, when such injuries arose out of and in the course of employment. It is important to determine the location of the industry. If the industry in which plaintiff was employed was in fact located in Minnesota, he was entitled to the protection of the Minnesota Workmen's Compensation Law, even though his injuries were received in another state, if the work he was doing was a part of the industry being carried on in the State of Minnesota, or was incident thereto." (Pages 624-625)

* * * * *

"We think it clear that the plaintiff was employed in a business or industry localized in Minnesota, and hence his right to compensation for injuries received during his employment must be determined exclusively under the Workmen's Compensation Act of that State. He could not, therefore, maintain a common law action for damages predicated upon negligence. The judgment appealed from is affirmed. (Emphasis added, page 625.)

See also *Duskin v. Pennsylvania Central Air Lines*, C.C.A. 6, 1948, 167 Fed. (2d) 727.

The same rule applies to injuries or death resulting from crashes occurring in foreign countries. Thus, in *Spelar, Administratrix v. American Overseas Air Lines, Inc.*, U.S.D.C., S.D.N.Y., 1947, 80 Fed. Supp. 344, involving a wrongful death action brought for the death of a flight engineer killed in an airplane crash in Newfoundland, the court held that the New York Compensation Act was applicable, and that the wrongful death action otherwise available under Newfoundland law was barred by the exclusive remedy provisions of the New York Compensation Act. In *Urda v. Pan American Airways*, C.C.A. 5, 1954, 211 Fed. (2d) 713, a personal injury action was brought by an airline steward for injuries received in a crash in Brazil. The court

held that the Florida Workmen's Compensation Act governed, and that that Act barred any actions based on Brazilian law.

It is important to note that these cases sustaining the paramount and controlling nature of the applicable State Workmen's Compensation Act were decided, *not* upon the theory that there was *no* local wrongful death act (that is, local to the place of the crash) or that the local wrongful death statute was for some reason intrinsically defective and invalid, nor even upon the theory that such local statutes would not apply to foreign airplanes merely passing over the local territory. These cases were instead decided upon the basis that where *both* the applicable Workmen's Compensation Act and the local wrongful death act would otherwise apply, it was the former which governed and controlled, and which afforded the sole and exclusive remedy; that is, the Workmen's Compensation Act excluded the operation of the *otherwise applicable* wrongful death act.⁶

6. The preferred status of workmen's compensation remedies over tort remedies in general is exemplified by the two recent United States Supreme Court decisions of *Feres v. United States*, 1950, 340 U.S. 135, 95 L.Ed. 152, and *Johansen v. United States*, 1952, 343 U.S. 427, 96 L.Ed 1051. The *Feres* case held that a soldier's sole remedy against the United States for personal injuries lay in the compensation-type remedies available to servicemen, and that resort could not be had to the Federal Tort Claims Act. The *Johansen* case held that the Federal Employees Compensation Act was the exclusive remedy for injuries sustained by a civilian member of the crew of an Army transport and that resort could not be had to the Public Vessels Act for a tort recovery. In each case the result was reached although there was *no* specific "exclusive remedy" provision and the language of the "tort" statute relied upon was general in nature, and literally applicable.

See also to the same effect the recent Court of Appeals (D.C.) case of *Aubrey v. U. S.*, 1958, 254 Fed. (2d) 768, an opinion by Justice Reed, holding that the District of Columbia workmen's compensation act precluded an employee of a Navy officer's open mess from suing the United States under the Federal Tort Claims Act.

To sum up, then, in stating the legal background for the present case, we believe it is clear beyond dispute that the paramount and exclusive nature of the applicable Workmen's Compensation Act *would* control:

- (1) If the airplane crash had occurred in California;
- (2) If the airplane crash had occurred in any other State of the United States;
- (3) If the airplane crash had occurred in any foreign country.

Under any of the above situations, if an airline employee were injured, he would receive a State Workmen's Compensation remedy, and that only; if he were killed, his family would receive death benefits under the State Workmen's Compensation Act, and those benefits only.

The question presented in the District Court in this case was: What was the result if an airline crash occurred—not over land—but over or upon the ocean:—

(1) Did the same law (the applicable State Workmen's Compensation law) govern *which would govern in the case of any other accident*; or

(2) Did an entirely new and different law all of a sudden apply, with entirely different legal rules both as to the determination of liability and of damages?

It was the contention of Pan American that both under the statutory and case law, and as a matter of common sense and practicality, the same law of industrial injuries that would apply to any other airline accident applied to an airline accident occurring on or over the high seas; it was the contention of Libellant that an entirely new and different law applied, purely due to the fortuitous location of the scene of the accident.

The District Court, in a well-reasoned opinion, sustained the contention of Pan American.

The Same Principle Which Governs Elsewhere, the Paramount Nature and Exclusive Effect of the Workmen's Compensation Remedy, Applies in the Instant Case. The Situation Is Not Changed by the Fact a Federal Remedy Might Exist in the Absence of Any State Compensation Remedy.

In their Opening Brief, Appellant's counsel quote Sections 1 and 2 of the Federal Death on the High Seas Act (46 U.S.C.A. Sections 761-767), cite the cases previously discussed which sanctioned *passenger* claims arising out of airline crashes at sea to be brought under that Act, and—without further citation of authority or reasoning, and totally ignoring the reasoning of the District Court and the authorities cited in its opinion to the contrary—assume they are thereby entitled to prevail.

As previously noted, we believe it is not too much to say that in their Opening Brief Appellant's counsel have avoided, seemingly intentionally, the only issue in this case. As very clearly appears from Judge Goodman's opinion, the issue is *not* whether the Death on the High Seas Act applies to *passengers*, nor even whether it would apply to airline flight personnel in the *absence* of an applicable State Workmen's Compensation Act; the issue instead is whether the Death on the High Seas Act is applicable to industrial injuries or deaths of such personnel which *are* covered by a State Workmen's Compensation Act.

At first blush, the thought comes to mind that the existence of *any* Federal remedy will control and, if necessary, supersede any otherwise applicable State statute, on the theory that this result is compelled by the Supremacy Clause of the Constitution. This, however, is not correct. (We of course concede that a valid Act of Congress which *intends* to supplant State legislation dealing with the same subject does in fact supplant and supersede such State legislation, if such intention is either expressly or impliedly

made clear; as will be shown hereafter, however, this is not the situation here.)

This is made clear by the line of cases, cited in Judge Goodman's opinion, which the United States Supreme Court decided in the 1920's.⁷

The first of these, *Grant Smith-Porter Ship Co. v. Rohde*, 1922, 257 U.S. 469, 66 L. Ed. 321, dealt with a workman injured while at work on a partially completed ship lying at dock in a river near Portland, Oregon. The Oregon Workmen's Compensation Law (applicable unless specifically waived, which had not been done) purported to apply to shipbuilding. The workman sued the employer for negligence in the Federal Admiralty Court. The Ninth Circuit Court of Appeals certified to the United States Supreme Court two questions: (1) whether the general admiralty jurisdiction of the Federal Court would normally extend to the accident in question; and (2) whether such admiralty right of action would be abrogated by the State Workmen's Compensation Act. The Supreme Court discussed the facts and then stated:

"Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential * * *

"Construing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state, *we answer yes.*

7. By essentially the same court, it is interesting to note, which decided *Southern Pacific Co. v. Jensen*, 1917, 244 U.S. 205, 61 L.Ed. 1986.

“Assuming that the second question presents the inquiry whether, in the circumstances stated, *the exclusive features of the Oregon Workmen’s Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes.*” (257 U.S. at pages 477-478; emphasis added.)

Millers’ Indemnity Underwriters v. Braud, 1926, 270 U.S. 59, 70 L. Ed. 470, dealt with the accidental death of a diver employed by a shipbuilding company, killed while submerged from a floating barge. The State Court sustained a compensation award under the Workmen’s Compensation Law of Texas. (Coverage under the Texas Workmen’s Compensation Act was compulsory, not elective.) The employers and its compensation carrier appealed, insisting:

“* * * that the claim arose out of a maritime tort; that the rights and obligations of the parties were fixed by the maritime law; and that the State had no power to change these by statute or otherwise.” (270 U.S. at 63)

The United States Supreme Court discussed its prior decision in the *Rohde* case and then said:

“In the cause now under consideration the record discloses facts sufficient to show a maritime tort *to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act*; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. *The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.*” (270 U.S. at pages 64-65; emphasis added.)

In *Alaska Packers Association v. Industrial Accident Commission*, 1928, 276 U.S. 467, 72 L. Ed. 656, a workman

for a fish cannery in Alaska (who had been hired in California) was injured while endeavoring to push into navigable water a stranded fishing boat. An Industrial Accident Commission award was challenged:

“* * * upon the sole ground that when injured he was doing maritime work under a maritime contract and that the rights and liabilities of the parties must be determined by applying the general rules of maritime law, and not otherwise.” (276 U.S. at page 469.)

The Court, in reply, said:

“Whether in any possible view the circumstances disclose a cause within the admiralty jurisdiction, we need not stop to determine. *Even if an affirmative answer be assumed*, the petitioner must fail. Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law.” (276 U.S. at page 469; emphasis added.)

There are two significant propositions to be drawn from the above cases:

(1) The Court did *not* hold that an admiralty remedy would normally *not* apply to the fact situations existing in these cases; on the contrary, in each case it held that (absent a State Workmen's Compensation Act) the general admiralty jurisdiction *would* apply.

(2) The Court did *not* hold that a rule of absolute uniformity was compulsory within the admiralty jurisdiction, and that variation created by State law was not permis-

sible;⁸ on the contrary, it held that State law might apply (and *would* be applied by the court) save where it would (in the words of the court in the *Alaska Packers* case, at page 469) “interfere with the *essential* uniformity of the *general maritime law*.” (The same thought was expressed in the *Rohde* case (at page 477) where the court stated that local law could not “*materially* affect any rules of the *sea* whose uniformity is *essential*” and in the *Rohde* case (at page 64) that local law was invalid only where it would work “*material* prejudice” to a “*characteristic* feature” of the “*general maritime law*”).

We believe these cases furnish a decisive answer to any contention by counsel for Appellant that the existence (in the *absence* of an applicable State Compensation Act) of a Federal remedy immediately and at once acts to exclude and render ineffective a State Compensation Act that is applicable. Such was certainly not the holding of the United States Supreme Court in the cited cases; on the contrary, they held in each case that the *State* Compensation Act was effective to exclude *the otherwise applicable Federal* remedy.

We believe the instant case falls well within the rule of these cases. In the words of the Supreme Court in *Grant Smith-Porter Ship Co. v. Rohde* (discussed at pages 20-21 above):

“Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential * * *”

8. Even in the original *Jensen* case, Justice McReynolds stated (244 U.S. 205 at 216, 61 L.Ed. at 1098): “* * * it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. *That this may be done to some extent cannot be denied* * * *” (Emphasis added).

The employment here involved was simply not "maritime" nor connected directly nor indirectly with navigation or sea-borne commerce, the traditional subjects of the "general maritime law". There is no present and existing "uniformity" or even similarity (certainly not an "*essential*" uniformity) between either the legal or factual positions of the traditional maritime employments, and the employment of the airline flight personnel here involved.

If there were in fact an "identity", or even a "family relationship" between traditional maritime employments, on the one hand, and airline employees on the other, Congress would undoubtedly have *assumed* jurisdiction over the field of industrial injuries of airline employees, and have passed a law assimilating the rights and remedies of such employees for industrial injuries to those of maritime workers and seamen, such as the Federal Longshoremen's Act or the Jones Act. This Congress has not done. This intentional failure to act is powerful evidence that, certainly in the eyes of Congress, there is no "essential uniformity" in legal treatment to be preserved between these two widely differing industries, the most ancient form of transportation on the one hand, and the most modern on the other, operating in two completely different media.

The employment, duties, skills, working conditions, interests, problems and general situation of airline crews flying across land and ocean are completely dissimilar and unrelated to those of seamen engaged in traditional maritime pursuits. True "uniformity" could not be created, let alone preserved, by treating airline crews like seamen. The true uniformity and identity which in fact exists is that between airline flights over oceans and airline flights over land; the uniformity in legal treatment that should exist is between those two situations. To make the respective rights and duties as between the crew members of a commercial

airliner and their employer radically vary depending on whether a particular flight is over land or over ocean (which might even vary upon the particular choice of routes between the same two points or, even more anomalously, in the case of an "ocean" flight (which is in fact always a flight over both land and ocean) would vary depending upon whether trouble developed over the over-land or over-ocean portion of the flight) would be not to preserve and protect an existing "uniformity," but would rather completely destroy uniformity and instead weave a crazy-quilt pattern into the law of industrial injuries of the airline industry.

It would create only confusion and arbitrary and unexpected consequences for both airline employees and employers to hold that, while Workmen's Compensation governed in the case of all industrial injuries arising on or over land, in the case of injuries or death occurring upon or over the water Workmen's Compensation was inapplicable and recovery for industrial injuries in such latter (and exactly equivalent) situation could be had only upon proof of fault. Where no fault of the employer was involved (and, in view of the high standard of care used in the aviation industry and the various natural hazards of air transportation, this would usually be the case)⁹ there would be no recovery at all, either for an injured employee or, in the event of death, for his dependents. Even if it be assumed that fault on the part of the employer was present, in the nature of the case this would be difficult or impossible for the claimant to establish and there again recovery would be defeated. Even where negligence could be shown and a re-

9. In this connection the cases cited in Appellant's Opening Brief are very much in point. Both the *Trihey* case and the *D'Aleman* case affirmed trial court rulings in favor of the *defendants*, on the ground *that no negligence had been shown*. In addition, any plaintiff would face the barrier to recovery discussed on pages 39-40 of this Brief.

covery secured, this would occur only after prolonged litigation. Prompt payment of the medical and indemnity benefits provided under a Workmen's Compensation Act would be conspicuously absent. So anomalous a result, with such unexpected consequences, should be avoided if it is possible to do so.

The Existence of the Federal Death on the High Seas Act Does Not Change the Situation. The Intention of Congress Was Merely to Remedy a Defect in the Common Law and Not to Displace or Affect State Remedies, Particularly State Workmen's Compensation Acts. This Is Shown by: (a) the Language of the Act, (b) the Legislative History of the Act, (c) the Cases.

Libelant's counsel will undoubtedly seek to distinguish the United States Supreme Court cases cited in the previous section on the ground that those cases dealt with an admiralty remedy *not* specifically created by statute, and the Libelant here is relying upon an express act of Congress, the Death on the High Seas Act.

The question thus presented, therefore, is whether or not it was the intent of Congress in enacting the Death on the High Seas Act to displace and supersede State workmen's compensation remedies which would otherwise govern. The intent of Congress may be sought by examining: (a) the language of the Act, (b) the legislative history of the Act, and (c) cases construing the Act. The fact that Appellant's counsel have chosen to discuss neither the language of the Act, nor its legislative history, nor cases construing it in this respect (save for a left-handed reference to *Wilson v. Transocean*, possibly not directly cited because it was so clearly and decisively distinguished by its author, Judge Goodman, in his opinion in the instant case) suggests, as proves to be the case, these sources help only Appellee.

(a) The Language of the Act Suggests No Intent to Displace State Compensation Remedies.

The language of the Death on the High Seas Act contains nothing expressly purporting to supersede State workmen's compensation remedies. Indeed, the exact reverse is true. Section 7 of the Act (46 U.S.C.A. Section 767) reads as follows:

"Exceptions from Operation of Chapter.

"The provisions of any State statute giving or regulating rights of action or remedies for death *shall not be affected* by this chapter * * *" (Emphasis added.)

The California Workmen's Compensation Act and its exclusive remedy provision are "provisions" of a "State statute * * * regulating * * * remedies for death * * *". To deny it effect would be to "affect" it to the extreme degree; it would be in effect to *repeal* it.

The language is so clear that we believe, if we wished, we could well stop here.

(b) The Legislative History Does Not Indicate Any Intention to Displace State Workmen's Compensation Acts.

The Death on the High Seas Act was passed by the 66th Congress and became law on March 30, 1920. The bill was debated in the House of Representatives on March 17, 1920; the report of the debate appears in 59 Congressional Record, pages 4482-4487. A study of that debate, we submit, reveals two propositions very clearly:

(1) The sole purpose of the bill was to remedy a defect of the common law, whereby a defendant who had negligently injured another, and was liable for said injuries if the victim lived, escaped liability altogether if the victim died. On land, this defect had been remedied by statute by most State legislatures, but the common law rule had not been changed in admiralty. This anomaly in admiralty law

was vivid in the mind of the Congress, in view of the litigation arising out of the then-recent sinking of the Titanic. The purpose of the Act was to remove this anomaly of the common law and permit recovery in the event of death under the same circumstances which would have governed had the decedent survived. It seems safe to say that had there been no such anomaly of the common law, there would never have been a Death on the High Seas Act.

(2) It was the intention of Congress not to displace or disturb State remedies. This was made very clear by the circumstances which led to the offering and adoption of an amendment by Congressman Mann. As originally proposed, the bill *would* by implication have superseded State remedies. Congressman Mann specifically objected to this and proposed an amendment deleting the language which would have led to this result. The amendment, although opposed, was adopted.

Pertinent portions of the legislative history, which clearly demonstrate the above two propositions, appear in the Appendix to this Brief.

With respect to the question whether the Act was intended to supersede State workmen's compensation remedies, it is pertinent to note that the Congress which enacted the Act in 1920 was friendly, not hostile, to the maximum possible application of State workmen's compensation acts. As appears in the Congressional debate quoted in the Appendix, the Act had been under consideration for several years or more before its enactment by the 66th Congress. The case of *Southern Pacific Co. v. Jensen* (referred to at page 20 of this Brief above) holding (in a situation where Congress had not specifically spoken) that State compensation acts could not validly apply to traditional maritime employments insofar as uniformity was essential, was

decided on May 21, 1917. On October 6, 1917, the 65th Congress passed a law amending the Judiciary Act so as to specifically provide there was preserved "to claimants the rights and remedies under the workmen's compensation law of any State". (Act of October 6, 1917, Chapter 97, 40 Stat. at L. 395.) This was the posture of the law on March 30, 1920, when the Death on the High Seas Act became law. Thereafter, when the United States Supreme Court subsequently held (5-4, reversing the New York State Courts) that this law was unconstitutional insofar as it was held to permit a New York State workmen's compensation law to be applied to a bargeman who was injured while "doing work of a maritime nature" *Knickerbocker Ice Co. v. Stewart*, 1920, 253 U.S. 149, 64 L. Ed. 834, the 67th Congress promptly passed the Act of June 10, 1922, Chapter 216, 42 Stat. at L., 634, which again sought to authorize jurisdiction of the State workmen's compensation laws to the maximum possible extent. (This Act was subsequently held unconstitutional, as applied to stevedores "whose employees work only on board ships in the navigable waters of Puget sound" (264 U.S. 221) in *Washington v. Dawson & Co.*, 1924, 264 U.S. 219, 68 L. Ed. 646.)

We submit that these Acts of the 65th and 67th Congresses (held invalid as to particular fact situations upon grounds not relevant to our case, see discussion at pages 20-24 of this Brief) constitute persuasive evidence as to the general attitude of the 66th Congress with respect to State workmen's compensation acts, at the time it considered and enacted the Death on the High Seas Act.

We think the foregoing makes it overwhelmingly evident that Congress, in enacting that Act, had neither a specific nor a general intent to displace or in any way affect workmen's compensation acts, but rather that both the general and specific intent of Congress was to the contrary.

(c) Neither the Holdings Nor the Reasoning of the Decided Cases Indicate That the Death on the High Seas Act Superseded State Compensation Remedies.

The citation by Appellant's counsel of Judge Waterman's concurring opinion in the *D'Aleman* case (*supra*, pages 8-9) suggests that their ultimate reliance will be placed on several cases which hold that the Death on the High Seas Act displaces State wrongful death acts, the leading of which is *Wilson v. Transocean Air Lines*, U.S.D.C., N.D. Cal., 1954, 121 Fed. Supp. 85. It is significant, therefore, that the author of the *Wilson* opinion, Judge Louis Goodman, found the ruling therein totally inapplicable in the instant case.

In the *Wilson* case Judge Goodman expressed the opinion (121 Fed. Supp. at pages 90-91) that the enactment of the Federal Death on the High Seas Act superseded the operation of State *wrongful death acts* upon the high seas. (This statement was, under the facts posed in the *Wilson* case, arguably dictum, since, as appears in footnote 32 on page 93 in the opinion, the California Wrongful Death statute (upon which plaintiff relied) did not in any event purport to extend to the high seas or go beyond the territorial boundaries of California; and it was upon this basis that the defendant in the *Wilson* case argued it was inapplicable.) Although considering the contrary intendments of the Mann amendment, Judge Goodman arrived at his conclusion in view of various considerations, including the possible conflict arising from two statutes, State and federal, of the same general scope and character occupying the same area, and the desirability of avoiding constitutional questions which might otherwise arise under the *Jensen* doctrine.

It is very clear that the *Wilson* opinion dealt only with the effect of the Act upon State *wrongful death acts*. Judge

Goodman's language was carefully limited in this regard, as indicated by the following extracts:

"So, while the Mann amendment provides a strong argument that the Death on the High Seas Act does not supersede *state wrongful death statutes* on the high seas, the argument is not so strong but what it is overcome by other considerations."

* * * * *

"Moreover, any attempt to apply a *state wrongful death statute* to a death occurring on the high seas, would, today, raise a serious constitutional question." (Page 90)

* * * * *

"Finally, in all the years that have elapsed since the passage of the Death on the High Seas Act, it appears to have been the unanimous view of both the cases and the commentators that the Act supersedes the *state wrongful death statutes* as to actions for death occurring on the high seas." (Page 91, emphasis added.)

Not only the language but the reasoning likewise is limited to the case of State wrongful death acts. The arguments Judge Goodman cites in this connection are persuasive. It is not unreasonable to hold that a valid Congressional enactment upon *the very same subject* demonstrates a Congressional intent to supersede comparable State statutes. The Death on the High Seas Act is cast in the form of a typical wrongful death statute, and is couched in the most general terms, appropriate to such a statute. It is therefore not unreasonable to hold that State *wrongful death statutes* (couched in the same general terms, addressed to the same situation, with the same general solution) are superseded by the Act to the extent they purport to operate within the same area. (Moreover, State wrongful death statutes in general do not purport or intend to apply outside the State's own boundaries. There is no legal nor logical reason to apply State wrongful death acts outside

a State's boundaries, in contrast to State workmen's compensation acts, where extra-territorial jurisdiction *is* essential if their purposes are to be fulfilled. See page 10 of this Brief.)

As noted by Judge Goodman in his opinion in the instant *King* case, none of the factors which suggest the Act supersedes State *wrongful death statutes* are relevant in the case of State *workmen's compensation acts*, particularly as to workmen's compensation acts as applied to airline personnel flying over the high seas. The Death on the High Seas Act is not at all of the same type and character as the State compensation acts and is in no way directed at the specific problem (the regulation of the respective rights and remedies between airline employees and their employers) with which they deal. (The situation would, of course, be quite different were we considering an Act of Congress specifically regulating the respective rights and remedies of airline employees and their employers as to industrial injuries. The case would then resemble the situations presented by the F.E.L.A. Act and the Jones Act, where Congress has specifically dealt with the regulation of rights and remedies for industrial injuries in particular specified employments. As noted above, however, the Death on the High Seas Act was not framed at all with a view to regulating industrial injuries in a specific field of employment, but was merely to remove an anomaly in the general field of personal injury law.)

Likewise, as noted in Judge Goodman's opinion, and at pages 24-25 of this Brief, there is no possible conflict with the *Jensen* doctrine since airline personnel are *not* a traditional subject of maritime law, and to permit State workmen's compensation acts to apply to them would in no sense "interfere with the *essential* uniformity" of maritime law, since they are not a subject of maritime law to start with. Indeed, as Judge Goodman points out: "The decedent

was employed in a *non-maritime* industry and performed *no maritime work*. Indeed the only aspect of this case which gives it any maritime flavor whatsoever is the locale of the accident." (Tr. 36, 166 Fed. Supp. at page 139.)

In short, as Judge Goodman held, the judgment in this case is in no way inconsistent with the construction of the Act in *Wilson v. Transocean Airlines* and the cases following the *Wilson* case.

Moreover, it is interesting to note that Judge Denman, writing for the Court of Appeals for the Ninth Circuit in the *Higa* case (decided subsequent to the *Wilson* case) expressed the view that even State wrongful death acts were not superseded by the Act. In that case Judge Denman reviewed the legislative history and discussed the Mann amendment. (It will be recalled (see Appendix) that the purpose of the amendment, in the words of its author, Congressman Mann, was "so that the Act will not take away any jurisdiction conferred now by the States.") Judge Denman noted trenchantly: "Congress agreed with Mann * * *" (230 Fed. (2d) at pages 782-783). (The actual holdings of the *Higa* and *Wilson* cases are of course consistent; the issue in each was whether a cause of action founded on the Death on the High Seas Act had to be brought in admiralty, and each case held that it did.)

Thus whether the language of section 7 is to be read literally, as suggested by Judge Denman in the *Higa* case, or as subject to an implied exception as to State wrongful death acts by reason of constitutional questions otherwise created by the *Jensen* doctrine, as suggested in the *Wilson* case, this language must be given effect as to State workmen's compensation acts, at least insofar as they pertain to industrial accidents occurring in airline operations over the high seas, the contact of which with maritime matters is at most fortuitous and tangential.

We believe the foregoing shows the decided cases afford cold comfort for Appellant's contention in this case.

The only remaining authorities to be considered are the two treatises briefly cited in Appellant's Brief, namely, *Restatement of Conflicts of Laws*, Section 401, Comment c, and Hanna, *The Law of Employee Injuries and Workmen's Compensation*.

The language quoted by Appellant's counsel from Comment c to Section 401 of the *Restatement of Conflicts* (that State Workmen's Compensation Acts cannot be "constitutionally allowed * * * if the case is one which is within the scope of a Federal Employers Liability Act, or of admiralty jurisdiction") seems clearly read out of context. Section 401 appears in Topic 3 of Chapter 9 of the *Restatement* (Section 398-403) under the title: "Workmen's Compensation". The language quoted, in referring to "admiralty jurisdiction" seems clearly to refer to remedies provided under admiralty law to employees against their employers (the Jones Act, the analogue of the F.E.L.A.; maintenance and cure; and the warranty of seaworthiness) and seems clearly founded upon the cases holding that such acts of Congress, expressly regulating industrial injuries for certain specified employments, supersede State laws in the same area. Unless this language (which is neither clarified nor explained in any other part of Section 401, or elsewhere in the *Restatement*) is so construed, it is flatly inconsistent with the United States Supreme Court cases cited by Judge Goodman in his King opinion and at pages 20-23 of this Brief; it is hardly to be assumed that the authors of the *Restatement* intended such a conflict.

The sentence quoted by Appellant's counsel from Hanna, *The Law of Employee Injuries and Workmen's Compensation* does appear at page 488 thereof (though the author cites no cases in support of this statement, and it does not

specifically refer to airline employees). The statement, however, is of course completely consistent with the opinion of Judge Goodman in the instant case, which specifically noted that, in the absence of the State workmen's compensation act, a remedy under the Death on the High Seas Act would be available. The language quoted from Hanna does not even begin to deal with the only issue in this case, namely, the effect of a workmen's compensation act upon the Death on the High Seas Act.

It can thus be seen that any argument that the enactment of a "specific" act of Congress makes the situation of this case very different from that presented in the line of cases discussed at pages 20-24 of this Brief is completely without merit. That argument, when analyzed, must ultimately rest on a contention as to the presumed intent of Congress. The intent of Congress, however, as manifested in the express language of the Act and its legislative history, particularly in the setting of the times and in the light of the purpose of the Act, is clearly to the contrary.

On Any Theory the Liability Imposed by the Death on the High Seas Act Is a Purely Derivative Liability, and Requires for Its Imposition That the Defendant Be One "Which Would Have Been Liable if Death Had Not Ensued". Pan American Would Not Have Been Liable to John Elvins King if Death Had Not Ensued, and the Act Therefore Has No Application in This Case.

As noted above, we anticipate that Libelant's counsel will contend that, even though a non-statutory admiralty remedy might be superseded by a State compensation act, the contrary occurs where there is an express Federal statute and that that statute (omitting Section 7 thereof, which Libelant's counsel will undoubtedly seek to disregard), solely controls. We believe that the foregoing sections of this Brief sufficiently dispose of such contention. Even if

our position in this regard is not accepted, however, there is another equally sufficient answer.

It is to be noted that the Death on the High Seas Act does *not* provide that there is to be a cause of action in *every* case where a death occurs on the high seas due to negligence; instead the Act provides that with respect to a death caused by wrongful act, negligence or default on the high seas, a cause of action is granted "against the vessel, person or corporation which would have been liable *if death had not ensued*." The cause of action created lies only where the decedent might himself have recovered had he survived.¹⁰

10. That this is a basic principle in this area of the law clearly appears in the leading text book, *Tiffany, Death by Wrongful Act*, 2nd Edition, 1913, published only seven years before the Death on the High Seas Act was enacted. Section 63 of that text reads as follows:

"Sec. 63. *Act or Neglect Must Be Such that Party Injured Might Have Maintained Action.*

"An essential limitation upon the words 'wrongful act, neglect, or default' is created by the provision that they must be such as would have entitled the party injured to maintain an action therefor. This provision makes it a *condition* to the maintenance of the statutory action that an action might have been maintained by the party injured for the bodily injury. The condition has reference, of course, not to the loss or injury sustained by him, but to the circumstances under which the bodily injury arose, and to the nature of the wrongful act, neglect or default; and, although this condition has not been expressed in California, Idaho, Kentucky, and Utah, *no case has been found in which it has not been implied.*

"A *preliminary question arises*, therefore, in *every* action for death, namely, was the act, neglect, or default complained of such that if it had simply caused bodily injury, without causing death, the party injured might have maintained an action?" (Emphasis added, pages 132-133.)

The present vitality of this condition is illustrated by a quotation from the *Fernandez* case (discussed at Pages 8-9 above of this Brief) with respect to the very Act here in question:

"The Death on the High Seas Act recognizes this distinction for it does not create a cause of action or grant a right of recovery for death in every situation but only against those defendants 'which would have been liable if death had not ensued' ". (156 Fed. Supp. 94 at 97)

The liability thus created is a derivative liability to remedy the gap or omission in the common law whereby a defendant, liable for personal injuries caused by his negligence, nevertheless escaped liability because the plaintiff died.

It is clear from the legislative history previously discussed (see the introduction of the discussion of the bill by the House Committee chairman, quoted in the Appendix) that the purpose of the Act was solely to remedy this anomaly of the common law, and to bring the maritime law into conformity with modern notions in this respect. (Virtually all States had by this time enacted wrongful death statutes.) The purpose was to prevent a tortfeasor, otherwise liable by reason of his wrongful act, neglect or default, from escaping liability because the personal injuries inflicted proved fatal. This was achieved by, in substance, providing that the liability would continue to exist notwithstanding the death; the "person or corporation which would have been liable if death had not ensued" would still be liable. That the liability under the Act was intended to be merely the same liability which would have existed by reason of a defendant's wrongful act, neglect or default in the event death had not ensued, no more, no less, is shown by Section 5 of the Act, (46 U.S.C.A., Section 765) which provides as follows:

"If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title *during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default*, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title." (Emphasis added.)

The parallel structure is obvious. If an action is pending for personal injuries in respect of a wrongful act, neglect or default, and the plaintiff dies, the personal representative of the plaintiff is simply substituted and the suit may proceed under the Death on the High Seas Act. No problem is created because the liability being enforced is the same.

There is not even a hint, either in the legislative history or in the text of the Act, of any intention to impose liability for death where there would have been no liability for injury, or to disrupt and interfere with the scheme of State workmen's compensation acts (See 59 Congressional Record pp. 4482-4487).

It is clear that had King or the other air line personnel suffered only personal injuries from the accident in question they could *not* have sued Pan American on any theory of alleged negligence or wrongful conduct; their sole right would have been to compensation, payable, not on the basis of anyone's fault, but by reason of the industrial nature of the injury.

Even if in such a situation the airline personnel would have possessed a non-statutory admiralty remedy in the *absence* of an applicable State workmen's compensation act, the situation would be identical with those presented in the cases discussed at pages 20-24 of this Brief; that is, the exclusive nature of the State workmen's compensation act would control under the doctrine of the *Rohde* case. (In such a situation, involving personal injuries only, Libelant would be unable to try to distinguish those cases by citing the existence of an "express" Act of Congress, for there is none.)

As pointed out above, we believe that the situation of air line flight personnel is *sui generis*, and not properly to be assimilated with or even related to that of seamen

and others following traditional maritime pursuits. Even if the situation of air line personnel were in general assimilated to that of maritime workers, however, this would not help Libelant, for the reason that, (until the enactment of the *Jones Act* in 1920, specifically creating a remedy) the traditional admiralty rule was that a maritime worker, such as a seaman, could *not* sue his employer for injuries allegedly due to the employer's negligence, his sole remedies being maintenance and cure and the warranty of seaworthiness. Thus, in the leading case of *The Osceola*, 1903, 189 U.S. 158, 47 L. Ed. 760, a Court of Appeals certified to the United States Supreme Court the question whether the owners of a vessel were liable to a member of the crew for personal injuries sustained by him by reason of the master's negligent conduct in the navigation and management of the vessel. The Supreme Court, in a unanimous opinion, answered the certified question: "No", and held a seaman's remedies were limited to maintenance and cure and the warranty of seaworthiness, and that a seaman was *not* allowed to recover for the negligence of the master or any member of the crew.

This doctrine was re-enunciated in *Chelentis v. Luckenbach Steamship Co.*, 1918, 247 U.S. 372, 62 L. Ed. 1171, where the Court affirmed a nonsuit in a seaman's action for personal injuries allegedly due to negligence. The Court cited *The Osceola* and quoted with approval the language of the Court of Appeals below that

"by virtue of the inherent nature of the seaman's contract the defendant's negligence and the plaintiff's contributory negligence were totally immaterial considerations in this case." (Pages 379-380)

It was for the express purpose of giving seamen a remedy against their employer for the latter's negligence

that the Jones Act was passed in 1920 and that act (46 U.S.C.A., Section 688) is expressly limited to "seamen."

It is of course clear that flight personnel of commercial air liners, even when flying over oceans, are not "seamen" and that the Jones Act is inapplicable to them. See *Stickrod et al v. Pan American Airways Co.*, 1941 U.S. Av. Reports 69, 1 Av. Cases 942.

If air line personnel, therefore, are assimilated to maritime workers, this means that before 1920 they had no remedy against their employer for personal injuries due to the latter's negligence and, being *unaffected* by the Jones Act, *that situation remains true right down to the present date.*

This reasoning, we confess, may seem artificial, but it merely underscores the artificiality of trying to assimilate air line personnel to, or to treat them as comparable with, maritime workers. It is our belief that the only remedy for personal injuries arising from an industrial accident to air line personnel flying over an ocean is the applicable State Workmen's Compensation Act; that an air line employer is not liable on any negligence theory; that it is therefore not a "person or corporation which would have been liable if *death had not ensued*"; and that in the case of death, therefore, the Death on the High Seas Act does not apply.

Conclusion

The foregoing has demonstrated that:

(1) At the time of the accident in question the decedent King was acting within the course and scope of his employment with Respondent Pan American; that the California Industrial Accident Commission awarded a death benefit to Libellant, and against Respondent and its workmen's compensation insurance carrier, with respect to King's

death; that said award was based on a contested finding as to jurisdiction, and has now become final, so that the determination is now *res judicata*, and Libelant is estopped to challenge it; that the California Workmen's Compensation Statute expressly bars any other remedy;

(2) With respect to all other industrial accidents (including deaths) arising out of air line operations the applicable State Workmen's Compensation Act governs and controls the rights of the employees and employer; that under the applicable Supreme Court decisions, such State Workmen's Compensation Acts may exclude Federal Admiralty remedies otherwise available, where to do so would not materially interfere with the "essential uniformity" of maritime law; that to apply State Workmen's Compensation Acts with respect to air line industrial accidents occurring while airplanes are in flight over the ocean would not materially interfere with any essential uniformity of admiralty law, since airline employment is factually and legally totally unlike the traditional maritime pursuits;

(3) The existence of the Federal Death on the High Seas Act does not change the situation, since the intention of Congress, as expressed in the language of the Act and its legislative history, was not to displace State remedies; that in any event, the Act would at most supersede only State wrongful death acts, and not workmen's compensation acts;

(4) On any theory the Death on the High Seas Act is inapplicable to the present situation, since that Act merely preserves rights of action which the decedent would have had against persons "if death had not ensued"; that the decedent King would have had no right of action against his employer, Pan American, for personal injuries, since the same would have been barred by workmen's compensation and since no admiralty recovery is granted an em-

ployee against his employer for the latter's negligence, save in the case of the Jones Act, which covers only "seamen"; that the Death on the High Seas Act is therefore inapplicable.

In view of the foregoing facts and legal authorities, we submit the District Court correctly decided that Pan American was entitled to judgment as a matter of law on the admitted facts. That judgment was correct, and should be affirmed.

Dated at San Francisco, California, on May 8, 1959.

Respectfully submitted,

STEINHART, GOLDBERG, FEIGENBAUM
& LADAR
JOHN J. GOLDBERG
NEIL E. FALCONER

(Appendix Follows)

Appendix

Extracts from the Discussion in the House of Representatives on March 17, 1920 on the Proposed Death on the High Seas Act (59 Congressional Record, Pages 4482-4485, March 17, 1920; emphasis added.):

Chairman Volstead began the discussion:

“Mr. Speaker, this legislation is an old friend that has been pending in Congress a great many years. It has been passed from time to time, sometimes in the House and sometimes in the Senate. The bill, if you will examine the report made upon it, *is intended to supply a defect which now exists under what was the common-law rule* as to actions affecting injuries that might be caused through the wrongful act or neglect of persons engaged in shipping on the high seas. If the injury did not result in death, a cause of action exists; the injured person might go into a court of admiralty and secure relief, but if death resulted courts applied the old common-law doctrine that the cause of action dies with the person; that is, the cause of action was personal and did not survive the injured party.

“The object of this bill is to give a cause of action in case of death resulting from negligence or wrongful act occurring on the high seas. Nearly all countries have modified the old rule which did not allow relief in the case of death under such circumstances. Under what is known as Lord Campbell’s act, England many years ago authorized recovery in such cases. France, Germany, and other European countries now followed this more humane and enlightened policy and allow dependent parties to recover in case of death of their near relatives upon the high seas.

“This bill was introduced in the Senate, has been passed by that body, and is substantially in the form in which it passed this House in the Sixty-fourth Congress. In the Sixty-fifth Congress this same bill, or a very similar one, was reported from the Judiciary Committee, but did not reach consideration on the floor of the House. * * *” (Page 4482, col. 1-2)

"Mr. Mann of Illinois. Now, I do not know whether I am right or wrong about it, because I have not examined the report on this bill carefully as reported this time. But I remember this bill very distinctly in previous Congresses, and my impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that *the bill was not intended to take away any jurisdiction which can now be exercised by any State court* * * *" (Page 4484, col. 1)

* * * * *

"Mr. Mann of Illinois. We give a certain class of rights under this act. If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by State statutes, it ought to be very critically examined." (Page 4484, col. 2)

* * * * *

"Mr. Mann of Illinois. They would not be required to comply with the laws of a State. The gentleman's proposition [i.e., the bill *before* the Mann amendment] would take away the right of the State to apply its own laws." (Page 4484, col. 2)

* * * * *

"Mr. Mann of Illinois. That is the way it will be left, *so that the act will not take away any jurisdiction conferred now by the States.*" (Page 4485, col. 1)

No. 16,298

IN THE

United States Court of Appeals

For the Ninth Circuit

VIRGINIA J. KING, as Administratrix of
the Estate of John Elvins King,

Appellant,

VS.

PAN AMERICAN WORLD AIRWAYS, a cor-
poration,

Appellee.

APPELLANT'S REPLY BRIEF.

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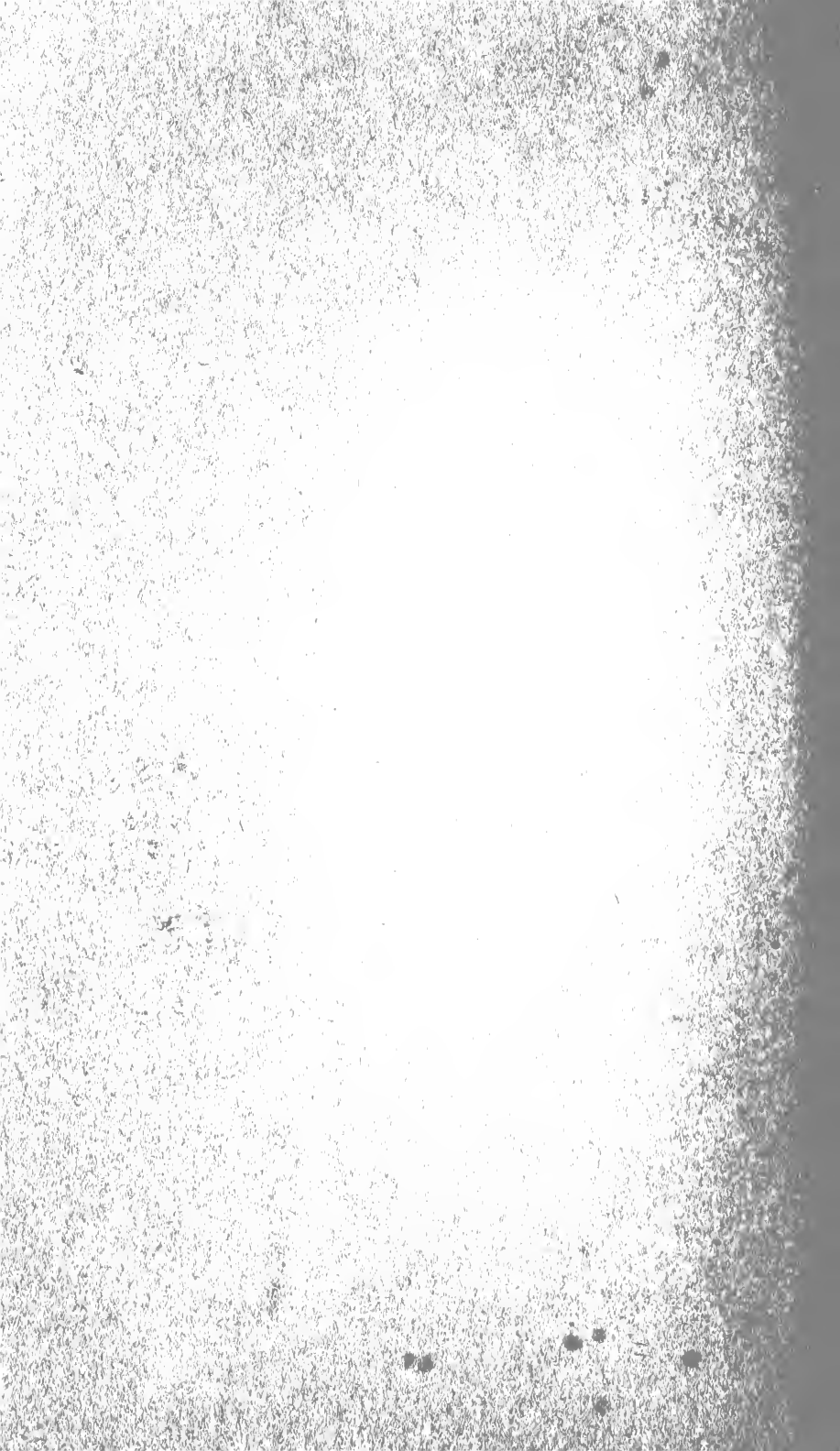
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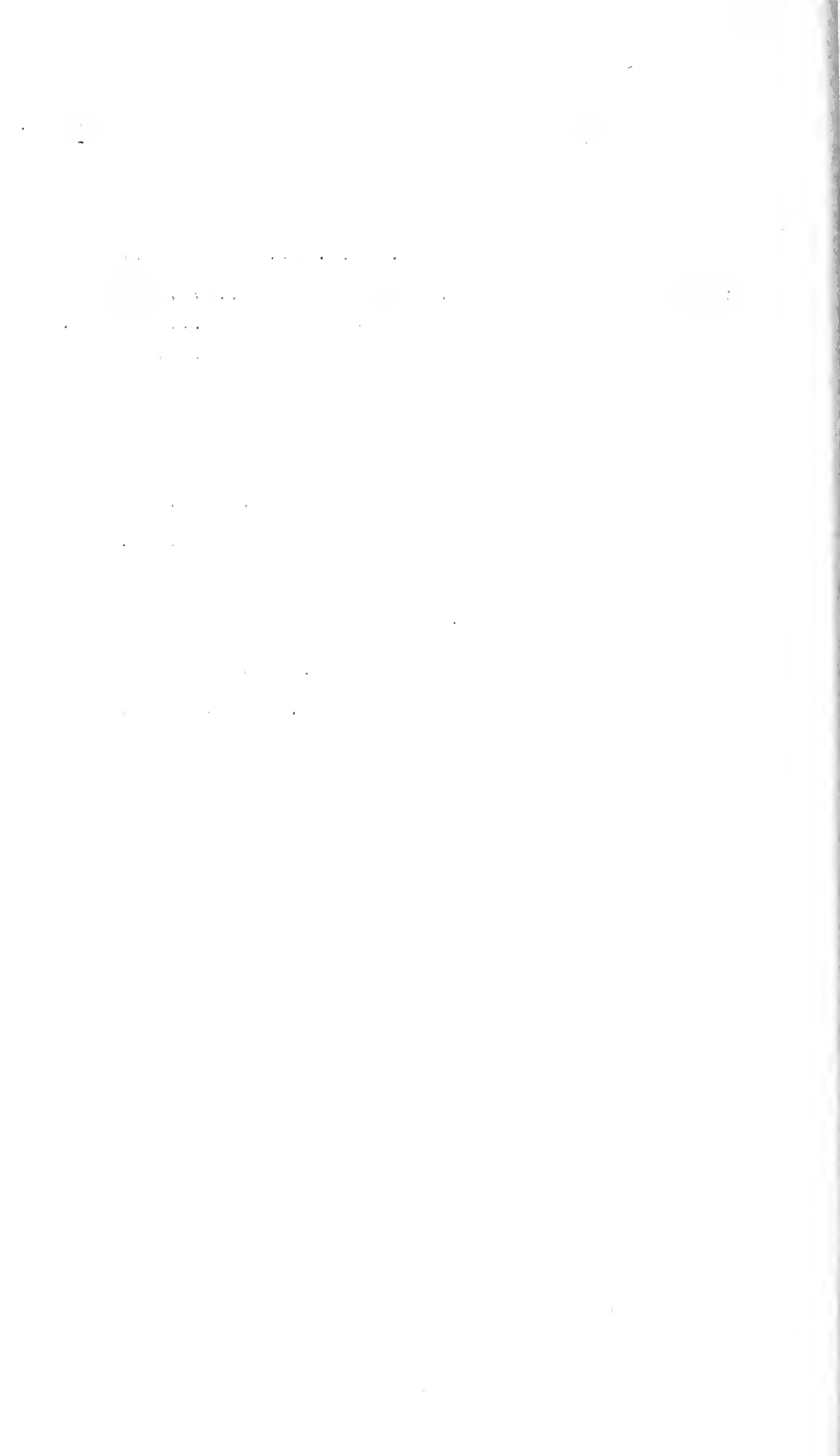
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No. 16,298

IN THE

**United States Court of Appeals
For the Ninth Circuit**

VIRGINIA J. KING, as Administratrix of
the Estate of John Elvins King,

Appellant,

vs.

PAN AMERICAN WORLD AIRWAYS, a cor-
poration,

Appellee.

APPELLANT'S REPLY BRIEF.

FOREWORD.

Both parties agree that the determinative question on the appeal is whether the California workmen's compensation law ousted the District Court of jurisdiction to entertain appellant's suit in admiralty under the Death on the High Seas Act. (41 Stat. 537, 46 U.S.C.A., §§761-768.)

That act was enacted March 30, 1920. It was enacted after the Supreme Court in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, decided May 21, 1917, had declared (1) that maritime accidents were within admiralty jurisdiction and state

workmen's compensation laws invading that field were inapplicable and invalid, and (2) that remedies under such compensation laws were not common law remedies saved to suitors under the constitution and the Judiciary Act.

The Jensen decision prompted Congress to pass the Act of October 6, 1917. (40 Stat. 895.) This attempted to amend §§ 24 (3) and 256 of the Judicial Code relating to admiralty and maritime jurisdiction (28 U.S.C.A., §§ 41 (3), 256), by adding to the clause saving common law remedies to suitors, the words: "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." The amendment was held unconstitutional in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, decided May 17, 1920.

Congress repeated the attempt by the Act of June 10, 1922. (42 Stat. 734.) The words to be added to the saving clause by that act were these: "and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the Workmen's Compensation Law of any state, district, territory or possession of the United States, which rights and remedies when conferred by such law shall be exclusive." This amendment was likewise held unconstitutional in *State of Washington v. Dawson & Co.*, 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646, decided February 25, 1924.

It thus appears that the Death on the High Seas Act creating a cause of action in admiralty for wrong-

ful death was enacted at a time when the Supreme Court had excluded workmen's compensation laws from the field of maritime torts, and at a time when Congress had failed in an attempt to have them included within that field. And it thus appears, moreover, that after Congress had enacted the Death on the High Seas Act it still deemed further legislation necessary in order to permit state workmen's compensation laws to enter the field of maritime tort.

That the doctrine of the *Jensen* case prevails over state workmen's compensation laws where maritime torts are concerned, is plain. (*Standard Dredging Co. v. Murphy*, 1943, 319 U.S. 306, 310, 63 S.Ct. 1067, 87 L.Ed. 1416; *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 336, 337, 73 S.Ct. 302, 97 L.Ed. 367.)

In contending that the court below should have entertained her suit in admiralty under the Death on the High Seas Act, appellant was content in her opening brief to rely upon two decisions of this court (*Higa v. Transocean Airlines*, 230 F. 2d 780; *Trihey v. Transocean Air Lines, Inc.*, 255 F. 2d 824), and one by the court in the second circuit (*D'Aleman v. Pan American World Airways*, 259 F. 2d 493).

In the *Higa* case, this court said at page 785:

“Here, however, the Death on the High Seas Act, creates the right to recover for wrongful death and designates not only the federal court for its enforcement, but a particular jurisdiction of that court. The right is a matter of federal law where state courts have no special competence. There is more here that ‘the grant of jurisdiction,

of itself . . . ' which indicates that jurisdiction was intended to be exclusive."

In the *Trihey* case, this court said at page 826:

"It (the action) arises under the Death on the High Seas Act, 46 U.S.C.A. §§ 761-768 (hereinafter, D.H.S.A.). Exclusive jurisdiction is conferred on the admiralty court. 46 U.S.C.A. § 761; *Higa v. Transocean Airlines*, 9 Cir. 1955, 230 F. 2d 780."

And in the *D'Aleman* case, the court said at page 495:

"The purpose of the Act (DHSA) was to create a uniform cause of action where none existed before and which arose beyond the territorial limits of the United States or any State thereof. * * * The Act was designed to create a cause of action in an area not theretofore under the jurisdiction of any court. The means of transportation into the area is of no importance."

In the *Higa* case this court referred with approval to the decision of Judge Goodman in *Wilson v. Transocean Airlines*, D.C.Cal. 1954, 121 F. Supp. 85. At pages 92 and 93, following a careful review of the history of the Act, it is there said:

"It is clear that the scope of the Death on the High Seas Act, within the geographical area of its operation, was intended to be as broad as the traditional tort jurisdiction of admiralty. As has been noted, the purpose of the Act was to afford a uniform right of action for death resulting from wrongful acts within the admiralty jurisdiction, excepting state territorial waters. The extent

of the right of action given by the Act is not defined in terms of the nature or the wrongful act causing death, but solely in terms of the locale of the act. The statute declares that there shall be a right of action 'Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas.' 46 U.S.C.A. § 761. A further indication that the statute encompasses all tortious acts on the high seas within the established jurisdiction of admiralty, is the language that suit may be brought against whoever 'would have been liable if death had not ensued.' "

The points urged by appellee in its brief will be separately answered.

1. SECTION 7 OF THE DEATH ON THE HIGH SEAS ACT DOES NOT FURNISH A BASIS FOR THE JUDGMENT OF OUSTER.

Said section 7 (46 U.S.C.A. § 767) provides:

"The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limit of any State, or to any navigable waters in the Panama Canal Zone."

The appellee contends that section 7 authorized the judgment of ouster. The contention is unsound. This court reviewed the history of the section and the circumstances surrounding its enactment and reached a conclusion contrary to the contention in the *Higa* case. (230 F. 2d 780, 782-785.) It characterized as

excellent (p. 784) the opinion of Judge Goodman in *Wilson v. Transocean Airlines*, D.C.Cal. 1956, 121 F. Supp. 780, where it was said, commencing at page 90 respecting said section 7:

“(1, 2) So, while the Mann amendment provides a strong argument that the Death on the High Seas Act does not supersede state wrongful death statutes on the high seas, the argument is not so strong but what it is overcome by other considerations. The Death on the High Seas Act was prompted, in large part, by the desire to put an end to the uncertainties attending the application of state statutes to death on the high seas. Many of these uncertainties would remain to plague both courts and litigants if the state statutes could still be availed of by suitors. In addition, since the Death on the High Seas Act was drawn with the purpose to afford an exclusive, uniform federal right of action for death on the high seas, the right of action which it created is not appropriate to serve as a mere supplement to state-created rights of action on the high seas.

Moreover, any attempt to apply a state wrongful death statute to a death occurring on the high seas, would, today raise a serious constitutional question. For decisions of the Supreme Court subsequent to its decision in *The Hamilton*, supra, in 1907, have cast doubt on the continued vitality of the holding in that case that a state has power to create a right of action for death on the high seas. In the celebrated case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, in 1917, and in cases that followed, the Supreme Court greatly broadened the scope of the doctrine that state statutes cannot interfere

with the essential uniformity of the maritime law. After the Jensen decision, the Supreme Court reaffirmed the power of the state to give a right of action for deaths occurring on their *territorial waters*, stating that such legislation was within the 'maritime but local' exception to the Jensen rule. *Western Fuel Co. v. Garcia*, 1921, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210. But since it would be difficult to bring a state-created right of action for death on the *high seas* within this exception, it is doubtful that the Supreme Court would now sanction the application of state death statutes to deaths on the high seas. * * *

Finally, in all the years that have elapsed since the passage of the Death on the High Seas Act, it appears to have been the unanimous view of both the cases and the commentators that the Act supersedes the state wrongful death statutes as to actions for death occurring on the high seas. An ambiguous and ill-considered amendment to the bill which became the Act, is not sufficient justification for reaching a contrary conclusion at this late date."

One of the cases cited by Judge Goodman in reaching the foregoing conclusions (p. 91, note 22) is *Echavarria v. Atlantic & Caribbean Steam Nav. Co.*, D.C. N.Y. 1935, 10 F. Supp. 677. At page 678 it is there said:

"(1) With the enactment of the Federal Death Act, the conclusion cannot be avoided that the death statutes of the several states were superseded so far as they had been theretofore applied to death on the high seas.

(2) It is clear that Congress could pass such an act under its power to regulate commerce and in pursuance to the constitutional provision extending the judicial power of the government to all cases of admiralty and maritime jurisdiction.

(3) Section 7 of the act (46 USCA § 767) indicates a carefully devised congressional plan to leave unaffected the operation of state death statutes over waters within one league of shore. Section 1 (46 USCA § 761) makes no mention of the state statutes, and there is implied in that omission the congressional intent that their operative force with respect to torts committed more than three miles from land be ended. The state statutes diverse in their terms and conflicting in remedies, afforded a poor substitute for a uniform act which Congress alone could legislate. They applied, none the less upon the theory that creating rights concerning a subject within the domain of the paramount authority of Congress to legislate so long as Congress failed to enact a statute relating to the same subject. In view of the congressional action, they can no longer be applied to American ships on the high seas."

Reference must also be made to the "twilight zone" cases in which it is held that resort may be had, *at the election of a claimant*, to either a federal or state forum offering concurrent rights and remedies. (*Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246; *Hahn v. Ross Island Sand & Gravel Co.*, 79 S.Ct. 266, 267.) Appellant's "election" here was under the Death on the High Seas Act.

2. OWNERS OF AIRLINES OPERATING OVER THE HIGH SEAS ARE LIABLE UNDER THE DEATH ON THE HIGH SEAS ACT FOR FAULT OCCURRING ON THE HIGH SEAS AND CAUSING THE DEATH OF AN EMPLOYEE.

Appellee apparently concedes that an airline is liable under the Death on the High Seas Act for the death of a passenger caused by the fault of the airline. But appellee is reluctant to make the same concession where the decedent is an employee.

Section 1 of the Act (46 U.S.C.A. § 761) provides that “*whenever the death of a person shall be caused by wrongful act, neglect, or default on the high seas beyond a marine league from the shore,*” the personal representative of the decedent “*may maintain a suit for damages in the district courts of the United States, in admiralty*” for the benefit of designated relatives of the decedent.

Unquestionably, the deceased employee was “a person.” And unquestionably, the act extends to wrongful death of employees. That has been the holding in cases where the personal representative has sued such employer under the Act. (*Polland v. Seas Shipping Co., Inc.*, 2 Cir. 1945, 146 F. 2d 875, 877; *The Black Gull*, 2 Cir. 1936, 82 F. 2d 758, 759; *Decker v. Moore-McCormack Lines, Inc.*, D.C.Mass. 1950, 91 F. Supp. 560, 561; *Batkiewicz v. Seas Shipping Co.*, D.C.N.Y. 1943, 53 F. Supp. 802, 803; *The Four Sisters*, D.C. Mass. 1947, 75 F. Supp. 399, 400.)

And contrary to what appellee supposes the Act is not a survival statute, nor is the cause of action it

creates derivative. It confers no right of action upon the decedent. It confers a right of action upon the personal representative of the decedent for the benefit of designated relatives of the decedent for the damages they have suffered by reason of his wrongful death. (*Decker v. Moore-McCormack Lines, Inc.*, supra; *Pickles v. F. Leyland & Co.*, D.C. Mass. 1925, 10 F. 2d 371, 372.)

As the above cases show, there is nothing cryptic about section 5 of the Act. (46 U.S.C.A. § 765.) For example, if a seaman is injured in the service of his ship on the high seas through fault of his employer, he may sue the employer for damages under the Jones Act (46 U.S.C.A. § 688), and if the injured seaman dies while the Jones Act suit is pending his personal representative and a suit under the Death on the High Seas Act may, by said section 5, be substituted therefor.

Appellee points out in its brief that a cause of action under the Death on the High Seas Act was approved in *Fernandez v. Linea Aeropostal Venezolana*, D.C.N.Y. 1957, 156 F. Supp. 94, where the decedent was an airline stewardess whose death was caused when the plane crashed on the high seas. She was an American citizen. (67 Yale Law Journal 1452, note 22.) Appellee quarrels with various aspects of the case but one thing is clear and that is that the court approved a cause of action under the Death on the High Seas Act resulting from the death of an employee of the airline.

3. THE CALIFORNIA WORKMEN'S COMPENSATION LAWS FURNISHED NO BASIS FOR THE JUDGMENT OF OUSTER.

In its brief the appellee deemed it significant that none of the cases cited in appellant's opening brief involved death of one having employee status at the time the wrongful act, neglect, or default occurred on the high seas. If significant at all, which appellant denies, the element has been eliminated by the *Fernandez* case, cited by appellee, where the death of the airline stewardess was caused by the *fault* of the airline occurring on the high seas, and by the cases cited herein where death of seamen employees was caused by the *fault* of shipowners or operators occurring on the high seas.

In turn, appellant deems it significant that none of the cases upon which the judgment of ouster was based in this case (*King v. Pan American World Airways*, D.C.Cal. 1958, 166 F. Supp. 136, 138), or upon which appellee relies, involved death on the high seas or the Death on the High Seas Act. All such cases fall within the "twilight zone" group where waterfront cases or cases with amphibious characteristics combining land-and-water employment are involved. Factually all such cases involve accidents occurring on or about local territorial waters. None involved a specific federal statute, such as the Jones Act (45 U.S.C.A. § 688) or the Death on the High Seas Act (45 U.S.C.A. § 761) constitutionally occupying or preempting a field in which federal jurisdiction is constitutionally paramount, and creating a right and remedy where *tort liability* exists and declaring the forum for redress.

Cases earlier cited herein demonstrate that federal statutes of that type are not to be subordinated to or ousted by state workmen's compensation laws. In the recent case of *Schellenger v. Zubik*, D.C.Penn. 1949, 170 F. Supp. 92, it was vigorously said, at page 93:

“Is a seaman who signs a State Workmen's Compensation agreement and receives payments thereunder, and executes a final receipt, barred from recovery of his rights under the Jones Act and under the doctrine of unseaworthiness?

(1) Upon evaluation of the underlying purport of admiralty law and the decisional law of this Circuit and the Supreme Court of the United States, I conclude the answer in the negative.

(2) This Circuit, invoking the views of the Supreme Court of the United States, and recognizing the rights and immunities of seamen, has noted with foreboding efforts to bring seamen, who under federal admiralty acts are entitled to sue for compensation for injuries in federal courts, within the scope of state compensation acts. Such efforts are unconstitutional as destroying the characteristic features of general maritime law, contravening its essential purposes, encroaching upon the paramount power of the Congress to enact national maritime laws and invading the jurisdiction which Congress has conferred upon courts of admiralty.

(3) Such a contract as defendant seeks to invoke, even if otherwise good, would still be void because opposed to public policy. * * *

(4) In the event plaintiff recovers a verdict in this action, this court will be free to apply equi-

table principles and set off compensation payments from the amount of the award. *Panichella v. Penna. R. Co.*, D.C. 167 F. Supp. 345."

The holding of the California Supreme Court respecting the workmen's compensation laws of California is in accord with the *Schellenger* case (*Occidental Ins. Co. v. Ind. Acc. Comm.*, 24 Cal. 2d 310, 149 P. 2d 841), and the view of the California Supreme Court in the *Occidental Insurance Company* case that California workmen's compensation laws are subordinate to specific federal statutes in maritime and admiralty matters have been approved in this circuit (*The Betsy Ross*, 9 Cir. 1944, 145 F. 2d 688, 689, 149 P. 2d 841; *Reynolds v. Royal Mail Lines*, D.C.Cal. 1956, 147 F. Supp. 223, 226).

Moreover, the workmen's compensation laws of California are self-subordinating to specific federal statutes of the character of the Jones Act or the Death on the High Seas Act. Thus Labor Code, § 3203, forming part of the workmen's compensation law, provides as follows:

"The provisions of Division 4 and Division 5 shall not apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the State, nor to employees injured while they are so engaged, except in so far as such divisions are permitted to apply under the Constitution or laws of the United States."

4. THE DOCTRINE OF RES JUDICATA IS INAPPLICABLE.

Appellee, citing *Sherrer v. Sherrer*, 1948, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429, invokes the compensation "award" as res judicata. (BA 12.)

Appellant did not invoke the state compensation laws. Appellee invoked them and the commission proceeded to an "award" over the protests and objections of appellant. (T. 18.) The Commission disclaimed that it had jurisdiction "to the exclusion of any rights of action on the part of dependents of the deceased employee(s) under the High Seas Death Act." (T. 30.) Liability under the Death on the High Seas Act depended upon the establishment of fault on the part of the employer. Liability under the state workmen's compensation laws could be established, of course, without showing fault on the part of the employer.

Appellant has earlier cited cases, including cases decided by the California Supreme Court, that jurisdiction of the district court in admiralty in matters such as this is paramount and exclusive, and that the so-called "award" by the Commission is without jurisdiction and invalid. That situation presents no problem of res judicata for there is none. Appellant has also earlier cited cases, "twilight zone" cases, where applicable federal and state laws give a claimant a right of election to resort to whichever he chooses. The rights under these laws are concurrent, and recovery under one is not a bar to additional rights under the other. It is the claimant, however, who makes the election. It is not forced upon him. If he

accepts payments under one, he cannot duplicate them under the other. (*Western Boat Bldg. Co. v. O'Leary*, 9 Cir. 1952, 198 F. 2d 409, 412-413.)

Obviously, there is no problem of res judicata here.

CONCLUSION.

Appellant therefore again respectfully submits that the summary judgment in favor of appellee should be reversed with directions to the District Court to hear and determine the suit in admiralty.

Dated, San Francisco, California,
May 29, 1959.

JOSEPH EDWARD SMITH,
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16298
No. ~~16,349~~

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For the Ninth Circuit

VIRGINIA J. KING, as Administratrix of
the Estate of John Elvins King,

Appellant,

vs.

PAN AMERICAN WORLD AIRWAYS,
a corporation,

Appellee.

Supplemental Brief for Appellee

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Appellee.

Supplemental Brief for Appellee

Introduction

Appellee sought leave to file this Supplemental Brief for the reason that examination of Appellant's Opening Brief and Reply Brief revealed that Appellant's counsel had in effect saved their argument for their Reply Brief, citing therein numerous cases not mentioned in their Opening Brief and advancing at least two new theories not even hinted at in the Opening Brief. Under these circumstances, a Supplemental Brief on the part of Appellee became necessary if Appellee was not in effect to be denied its right effectively to respond to Appellant's contentions.

Application of a State Workmen's Compensation Act to the Death of An Airline Employee in An Airplane Crash Over the Ocean Is Not Unconstitutional as in Violation of the Jensen Doctrine.

At pages 1-3 of her Reply Brief, Appellant in effect argues that application of a State workmen's compensation act to the instant accident is invalid under the *Jensen* doctrine, (*Southern Pacific Co. v. Jensen*, 1917, 244 U.S. 205, 61 L. Ed. 1086). Appellant seems to argue both:

- (1) that application of a State workmen's compensation act is unconstitutional, and
- (2) that the Supreme Court cases at the time the Death on the High Seas Act was enacted indicate a Congressional intent to exclude State compensation acts.

As to point (1), we believe Appellant slurs over the very basis and rationale of the *Jensen* doctrine, namely, that it dealt with *maritime* law and *maritime* employments. As to point (2), we believe Appellant's brief makes serious errors of fact, and that the correct facts refute the point Appellant seeks to make.

(a) The Jensen Doctrine Is Not in Point.

We believe the *Jensen* doctrine is irrelevant and a false issue in this case for one simple but fundamental reason: that doctrine relates to the need for uniformity in certain basic aspects of *maritime* law, and peculiarly to the need for uniformity in regulating rights between employers and employees in certain classic *maritime* employments, whereas this case is an *airline* case, dealing with an industrial injury to an employee in a *non-maritime* industry who performed *no maritime* work. If this point be firmly kept in mind in the following discussion, we believe the total inapplicability of the *Jensen* doctrine will be evident.

Certain traditional maritime employments have always been regulated by Admiralty law. The clearest situation, the regulation of the mutual rights and duties of seamen and their employers, is the classic subject of Admiralty law. Another clear situation is the employment of stevedores or longshoremen performing the work of loading or unloading ships, once done (and in some primitive ports still done) by seamen themselves.¹

In the original *Jensen* case the Supreme Court held, 5 to 4, that the New York State Workmen's Compensation Act could not validly be applied to the death of a stevedore killed while unloading a ship. The majority opinion held that "the general maritime law" was part of our national law (244 U.S. at 215) and that State legislation was invalid if it "works material prejudice to the characteristic features of the general maritime law" (244 U.S. at 216). The Court conceded:

"* * * it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. *That this may be done to some extent cannot be denied.*" (244 U.S. 216, emphasis added.)

1. The close relationship between the occupations of seamen and longshoremen is well described in *International Stevedoring Co. v. Haverty*, 1926, 372 U.S. 50, 71 L.Ed. 157, (decided before the enactment of the Federal Longshoremen's and Harbor Workers' Act) wherein Justice Holmes, in holding that longshoremen were "seamen" within the meaning of the Jones Act, said:

"It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible. The work upon which the plaintiff was engaged was a *maritime service formerly rendered by the ship's crew*. [Citation] We cannot believe that Congress willingly would have allowed the protection to men *engaged upon the same maritime duties* to vary with the accident of their being employed by a stevedore rather than by the ship . . . In this statute 'seamen' is to be taken to include stevedores *employed in maritime work on navigable waters*, as the plaintiff was, whatever it might mean in laws of a different kind." (372 U.S. at page 52, emphasis added.)

but held that on the facts of the case before it, the employment was so maritime that the State compensation act was invalid, stating:

“The work of a stevedore, in which the deceased was engaging, is *maritime* in its nature; his employment was a *maritime* contract; the injuries which he received were likewise *maritime*; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction.” (244 U.S. 217, emphasis added.)

Thus, in the *Jensen* case, and the two subsequent cases cited by Appellant’s counsel, wherein the Supreme Court under the leadership of Justice McReynolds held certain occupational pursuits subject to exclusive control by Admiralty, the opinion of the Court emphasized the “maritime” nature of the employment and its connection with the classic maritime pursuits.

In *Knickerbocker Ice Co. v. Stewart*, 1920, 253 U.S. 149, 64 L.Ed. 834 (another 5 to 4 case), the Court stated the decedent’s death occurred “while employed by Knickerbocker Ice Co. as bargeman and *doing business of a maritime nature*” (253 U.S. at 155, emphasis added) and held the particular act there in question invalid because seeking to sanction State compensation remedies “for injuries suffered by employees *engaged in maritime work*” (253 U.S. at 163-164, emphasis added).

In *Washington v. Dawson & Co.*, 1924, 264 U.S. 219, 68 L.Ed. 646, two cases were dealt with jointly; one presented the question “whether one engaged in the business of *stevedoring*, whose employees work *only on board ships in the navigable waters* of Puget Sound, can be compelled to contribute to the accident fund provided for by the Workmen’s Compensation Act of Washington”, while the other dealt with jurisdiction over “the death of a workman killed *while*

actually engaged at maritime work, under maritime contract, upon a vessel moored at her dock in San Francisco Bay and discharging her cargo" (264 U.S., pages 221-222, emphasis added.)

That the basis of the *Jensen* doctrine is the presence of an employment so *essentially maritime* that it should be regulated only by the Federal Government is made clear by examining the cases cited at pages 20-23 of our original Brief. These cases are, of course, all consistent with *Jensen* (as indeed is to be expected since they are unanimous opinions, written by Justice McReynolds, the author of the *Jensen* doctrine). Thus in *Grant Smith-Porter Ship Co. v. Rohde*, the Court emphasized the non-maritime aspects of the employment in question in the following words:

"The contract for constructing 'The Ahala' was *nonmaritime*, and although the incompleeted structure upon which the accident occurred was lying in navigable waters, *neither Rohde's general employment, nor his activities at the time, had any direct relation to navigation or commerce* * * * *And as both parties had accepted and proceeded under the statute by making payments to the industrial accident fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law.* Union Fish Co. vs. Erickson, 248 U.S. 308, 63 L.ed. 261, 39 Sup. Ct. Rep. 112. Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general *maritime* law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."

* * * * *

"This conclusion accords with *Southern P. Co. vs. Jensen* * * * and *Knickerbocker Ice Co. vs. Stewart*

* * *. In each of them *the employment or contract was maritime in nature* and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. *Here the parties contracted with reference to the state statute;*" * * * (257 U.S. at pages 473-474, emphasis added.)

See also *Millers' Indemnity Underwriters v. Braud*, 1926, 270 U.S. 59 at 64, 70 L.Ed. 470 at 472, and *Alaska Packers Assn. v. Marshall*, 1938, C.A. 9, 95 Fed. 2d 279.

Standard Dredging Co. v. Murphy, 1943, 319 U.S. 306, 87 L.Ed. 1416 and *Pennsylvania Ry. Co. v. O'Rourke*, 1953, 344 U.S. 334, 97 L.Ed. 367 (Appellant's Reply Brief, p. 3) do not aid Appellant. The *Standard Dredging* case dealt with the validity of a New York statute levying unemployment taxes as applied to maritime employers. The Court rejected the argument that admiralty jurisdiction was "exclusively Federal" and sustained the State tax. Not only did the case deal with a factual situation completely unlike ours, but the only references of the Court therein to the *Jensen* doctrine were to its present limited and qualified status, and were of an almost derogatory nature.

The *O'Rourke* case did not involve a State workmen's compensation act at all. In that case the Court held that on its particular facts the industrial accident there involved was governed by the *compensation* provisions of the Federal Longshoremen's Act and that that Act's *exclusive-remedy provision* barred prosecution of a tort style action under the Federal Employers Liability Act.

To sum up, therefore, the *Jensen* doctrine has to do with *maritime* law and *maritime* employments, whereas (to borrow the words of Judge Goodman in his opinion in the instant case) an airline crew is "employed in a *non-maritime*

industry and performed *no maritime work*" (Tr. 36, 168 Fed. Supp. at page 139).² There is, therefore, no possible conflict between the *Jensen* doctrine (whatever its present status) and the judgment of the Court below.

(b) The Correct Facts Negative Appellant's Contention as to Congressional Intent.

Our original Brief (at pages 26-35) demonstrated the intent of Congress in enacting the Death on the High Seas Act was merely to correct an anomaly of the common law and was not to supersede State remedies. Appellant's Reply Brief suggests the *Jensen*, *Knickerbocker* and *Dawson* cases argue to the contrary.

The Death on the High Seas Act became law on March 30, 1920, having passed the House of Representatives on March 17, 1920, and the U.S. Senate on March 22, 1920.

The *Jensen* case was decided on May 21, 1917. Less than five months later, on October 6, 1917, the 65th Congress passed an amendment (40 Stat. 895) to the Judiciary Act seeking to preserve "to claimants the rights and remedies under the workmen's compensation law of any State." While the validity of this Act had been challenged in the *Knicker-*

2. It is perhaps relevant to note that even application of the Death on the High Seas Act to airplane accidents at all is, so to speak, the product of "necessity". It has never seriously been contended that Congress, in enacting that Act (on March 30, 1920) had in mind airplanes or airplane flights over the ocean. The courts, however, have strained to find that Act applicable in passenger cases due to the well-known difficulties in the way of finding any State wrongful death statute applicable, and the fact that no other Federal wrongful death statute could possibly be construed to apply. The clumsiness of applying the Act to airplane cases at all was no doubt the cause of Judge Denman's reservation, as late as the *Higa* case in 1955, as to whether the Act applied at all in airplane cases. See the *Higa* opinion, 230 F.2d at page 786; "Our disposition of this case makes unnecessary the determination whether the High Seas Act applies to airplanes *which are not in any way water navigating vessels.*" (Emphasis added.)

bocker case (cited at page 4 of this Brief, and involving the death of a “bargeman * * * doing work of a maritime nature * * *”), this challenge had as of that time been uniformly rejected. The New York State Industrial Commission had granted an award and the New York State Courts had unanimously affirmed, holding the Act of October 6, 1917, valid in *Stewart v. Knickerbocker Ice Co.*, January 15, 1919, 173 N.Y. Supp. 924, and *Stewart v. Knickerbocker Ice Co.*, New York Court of Appeals, April 29, 1919, 123 N.E. 382. Not one judge had doubted the validity of that Act by March, 1920, when the Death on the High Seas Act was enacted by Congress. It was only two months afterwards, on May 12, 1920, that the Supreme Court, by a five to four vote, held this Act invalid as applied to the particular maritime facts involved in the *Knickerbocker* case.

Appellant’s statement (at page 3 of her Reply Brief) that the Death on the High Seas Act “was enacted * * * at a time when Congress had failed in an attempt to have [workmen’s compensation laws] included within that field” is therefore completely erroneous.

Appellant Has Misconstrued the Language and Effect of the Higa and Trihey Cases.

At pages 3-7 of her Reply Brief, Appellant has quoted certain language from two decisions of this Court, *Higa v. Transocean Air Lines*, 230 Fed. 2d 780, and *Trihey v. Transocean Air Lines, Inc.*, 255 Fed. 2d 824, and has also quoted certain language from an opinion of Judge Goodman in the District Court in *Wilson v. Transocean Air Lines*, D.C. Cal., 1954, 121 Fed. Supp. 85, in a manner to suggest that said language was approved in the *Higa* case. These quotations and this suggestion indicate that Appellant misconceives either the issue in this case or the issue in those cases.

The present case poses an issue of *substantive law* (the effect of a State compensation act on the Federal Death on the High Seas Act in the case of the death of an airline employee killed in the course of his employment during an airline flight over water). This is an issue of *substantive law* and is not an issue as to the choice of a proper *forum* for the enforcement of a given substantive law.

The issue in the *Higa* case dealt only with the latter question, namely, in what forum must an action to enforce a claim founded upon the Federal Death on the High Seas Act be brought? There was no issue as to any other substantive law being applicable. The *Higa* case held that an action brought to enforce a claim under the Death on the High Seas Act must be brought on the admiralty side of the Federal Court and could not be brought on the law side of the Federal Court nor in a State court. It was in this connection that Judge Denman cited the opinion of Judge Goodman in *Wilson v. Transocean*, characterizing that opinion as "excellent" (230 Fed. 2d 780 at page 784, Footnote 3, referring to p. 95 of the *Wilson* opinion and not to the pages quoted by Appellant's counsel). The question of applicable substantive law was not involved in *Higa*, but Judge Denman, in a dictum (at page 782) did discuss the history of Section 7 of the Death on the High Seas Act and clearly expressed the opinion that State remedies were *not* superseded.

The *Trihey* case involved neither a question of substantive law nor of the proper forum in which to enforce a given substantive law, but merely a question of sufficiency of evidence. The Court did in passing use the language quoted in Appellant's Reply Brief (at page 4) but this language, read in context, merely refers to the holding in *Higa*, that a claim brought under the Death on the High Seas Act must be brought in the admiralty court.

The fact that Judge Denman in the *Higa* case did not agree with the views expressed by Judge Goodman in the *Wilson* case as to the effect of the Mann Amendment to Section 7 is shown by the fact that in his opinion in the instant case Judge Goodman himself after referring to his *Wilson* opinion, stated:

“In a dictum in *Higa vs. Transocean Air Lines*, 230 Fed. 2d 780, 782-783 (1955), the Court of Appeals for this Circuit expressed a contrary view.” (Tr. 36 and 166 Fed. Supp. at page 139.)

In view of this, Appellant's contention to the contrary (at page 5 of Appellant's Reply Brief) seems wholly inexplicable.

Of course, this whole question is a side issue because, as Judge Goodman points out in his *King* opinion, the effect of State wrongful death statutes and State workmen's compensation acts are wholly different, the pertinent considerations are wholly different, and an intent to supersede the one in no way indicates an intent to supersede the other.³

The Davis Case and the "Twilight Zone" Doctrine Are Not Pertinent in the Instant Case.

At pages 8 and 14 of her Reply Brief, Appellant refers to “the ‘twilight zone’ cases” and *Davis v. Department of Labor*, 1942, 317 U.S. 249, 87 L.Ed. 246, apparently for

3. The case of *Echaverria v. Atlantic and Caribbean Steam Nav. Co.*, U.S.D.C., N.Y., 1935, 10 Fed. Supp. 677, (cited at pages 7 and 8 of Appellant's Reply Brief) (dealing with a claim for the death of a *passenger* who died while aboard a *steamship*, in which the Court held that “the *death statutes* of the several states” were superseded by the Federal Death on the High Seas Act and therefore “they can no longer be applied to American *ships* on the high seas.”) is at most like the *Wilson* case and distinguishable on the grounds pointed out in Judge Goodman's opinion in the instant case.

the proposition that Appellant had a "right of election" as to either the Death on the High Seas Act or the State workmen's compensation act, whichever she chose to pursue.

We assume Appellant would concede that those cases are in point at best only by way of analogy. We believe, however, there is no analogy whatever between the instant situation and the situation giving rise to the "twilight zone" doctrine.

The latter doctrine dealt with the problem of deciding whether industrial injuries in certain quasi-maritime situations fell within the coverage of the *Federal Longshoremen's and Harbor Workers' Act*, on the one hand, or State Workmen's Compensation Acts, on the other. As the Court knows, by its express terms the Federal Longshoremen's and Harbor Workers' Act applies only where a State workmen's compensation remedy "may not validly be provided by State law" (33 U.S.C.A. Sec. 903). In theory, therefore, under the language of the Longshoremen's Act there cannot be concurrent or overlapping coverage. In view of the fact, however, that the various quasi-maritime employments shaded off in fine graduations between "essentially maritime" employments and employments whose non-maritime aspects overshadowed their maritime aspects, and that the jurisdictional boundary line of the Longshoremen's Act was in one sense a question of fact, with only the vague and shadowy test of the *Jensen* doctrine as a legal signpost, grave practical problems arose in "close cases", resulting in numerous appeals, over-nice distinctions, and delay and uncertainty for employees and employers. The situation was described by the Supreme Court in the *Davis* case as follows:

"Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly

protected by this Federal Act; but, employees such as decedent here occupy that *shadowy area within which, at some undefined and undefinable point*, state laws can validly provide compensation. *This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must 'be determined in view of the surrounding circumstances as cases arise.'* John Baizley Iron Works v. Span, 281 U.S. 222, 230, 74 L.Ed. 819, 821, 50 S. Ct. 306. *The determination of particular cases, of which there have been a great many, has become extremely difficult.*

* * * * *

"The very closeness of the cases cited above and others raising related points of interpretation has caused much serious confusion. It must be remembered that under the Jensen hypothesis, basic conditions are factual: Does the state law 'interfere with the proper harmony and uniformity of' maritime law? Yet employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere. See e.g. Ayers v. Parker (DC) 15 F. Supp. 447. Such a result defeats the purpose of the federal act, which seeks to give 'to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation', and the state acts such as the one before us which aims at 'sure and certain relief for workmen.'

The horns of the jurisdictional dilemma press as sharply on employers as on employees. In the face of the cases referred to above, the most competent counsel may be unable to predict on which side of the line par-

ticular employment will fall. *The employer's contribution to a state insurance fund may therefore wholly fail to protect him against the liabilities for which it was specifically planned.*" (317 U.S. 249, 87 L.Ed. 248-250, emphasis added).

These considerations therefore led the Supreme Court to lay down the "twilight zone" doctrine; in effect, the Court indicated that in "close" *Longshoremen's Act* cases it would sustain the jurisdiction of whichever administrative compensation body—State or Federal—assumed jurisdiction.

Several things are to be noted concerning the *Davis* case and the twilight zone doctrine:

(1) First, in the *Davis* case itself, the Supreme Court *sustained* the jurisdiction of a *State Compensation Act*, citing the presumption of validity of State legislation and also the *Alaska Packers* case which first sustained the validity of extra-territorial coverage of State workmen's compensation acts (cited and discussed at page 10 et seq. of our original Brief).

(2) The quasi-maritime employments involved in the "twilight zone" shade off in fine gradations between "essentially maritime" and "not essentially maritime" classifications. The history of the case-by-case determination of the jurisdictional boundary of the Longshoremen's Act produced an unending series of "close cases" with appeal after appeal and the Supreme Court had "been unable to give any guiding, definite rule".

(3) The twilight zone cases all dealt with industrial injuries for which it was clear the employee *was* entitled to a *compensation type remedy*, the only question being whether the schedule of benefits under the State compensation act or the Federal compensation act was to be applied. The Supreme Court thought it intolerable in such a situ-

ation to permit appeals concerning jurisdictional boundary lines to defeat and frustrate “the justice involved in the modern principle of compensation” and “sure and certain relief for workmen”.

The instant situation is completely unlike the situation in the “twilight zone” cases. Unlike the imperceptible shading off between quasi-maritime employments, there is here a basic, fundamental, strikingly obvious distinction *in kind* distinguishing airline employment from maritime or quasi-maritime employments. There has been no history of doubt and confusion among employers and employees as to which compensation law is applicable. There has been and is only *one* compensation law applicable—the State compensation law. There is *no* Federal compensation law at all. The Death on the High Seas Act was in no sense drawn by Congress for the purpose of regulating industrial injuries in this (or any other) line of employment, but was merely to remedy an anomalous omission of the general common law.

To hold that Appellant has a “right of election” between a workmen’s compensation type remedy and a common law action for negligence, far from being required by the *Davis* doctrine, would instead go completely against the spirit of that case, which was to establish certainty for both employees and employers and to insure the “sure and certain relief for workmen” under “the modern principle of compensation”; it would destroy an essential element of the workmen’s compensation system—the “exclusive remedy” provision.

Miscellaneous Other New Points in Appellant's Reply Brief Answered.

At page 9 of her Reply Brief, Appellant cites cases to the effect that the Death on the High Seas Act extends to *employees*. The cases cited all deal with *seamen*, and none of

then deal with airline employees. Actually, only one of the cases cited, *The Four Sisters*, 75 F. Supp. 399, really held that a claim might be made under the Death on the High Seas Act for the death of a seaman in the scope of his employment against an employer; the other cases did not involve claims against employers for deaths of employees injured in the scope of their employment.⁴

The Four Sisters, however, is in no way in point to the problem in the instant case. The decedent was a *seaman*, and no one even contended that any State compensation act, with

4. Thus, *Becker v. Moore McCormack*, U.S. District Court, D. Mass., 91 Fed. Supp. 560, involving the deaths of two seamen killed in a collision between two vessels, were actions, not against the decedents' employer, but against the owner of the other vessel. The decedents were seamen on *The Corinthian*, which collided with *The Mormacfir*, operated by defendant Moore McCormack.

The Black Gull, 1936, C.C.A. 2, 82 Fed. 2d 758, affirmed a judgment for the death of a pilot killed by the negligence of a ship about to take the pilot aboard. The Court held that if the suit could not properly be brought under the Jones Act, on the contention that the pilot was not an "employee" of the defendant (as the defendant apparently argued) nevertheless the judgment could be sustained under the Death on the High Seas Act ("We have assumed that a compulsory pilot is *not* an employee of the vessel * * * therefore any duty of protection owed to him * * * must rest on some other basis than employment" (page 761)).

Polland v. Seas Shipping Co. was a death action under the *Jones Act* brought on the law side of the District Court with a jury. On appeal, the defendant argued that drowning was not covered by the *Jones Act*; the court held it was.

Batkiewicz v. Seas Shipping Co., U.S.D.C., N.Y. 1943, 53 Fed. Supp. 802, 803, involved a claim for the death of a seaman employed by the defendant, who was torpedoed on one ship and was being transported back to this country "as a passenger" (page 802) on another of defendant's ships. Plaintiff's theory was that the decedent had become mentally unbalanced and that the defendant negligently failed to restrain him, with the result the decedent jumped overboard. Plaintiff's complaint originally pleaded only the *Jones Act*. Thereafter plaintiff's attorney sought to add a count under the Death on the High Seas Act, since he began to doubt whether his claim properly lay under the *Jones Act* (undoubtedly on the theory that, since the decedent was riding as a "passenger", it might be contended that he was not an "employee" at the time of his death). The Court merely held that the complaint could be amended to add such a count.

an "exclusive remedy" provision, applied. The case rather dealt with the question whether the *Jones Act* (which creates a negligence cause of action and does *not* have an exclusive remedy provision) excluded a remedy under the Death on the High Seas Act, which likewise affords a negligence cause of action.

Schellenger v. Zubick, U. S. District Court, Pa., 1959, 170 Fed. Supp. 92, held that a *seaman's* claim under the *Jones Act* was not barred by the execution of a "State workmen's compensation *agreement*". We have no quarrel with any such holding. The difference between the employments of seamen and airline employees is fully covered in pages 24-26 and 35-40 of our original Brief and at pages 2-8 of this Brief. Moreover, we are relying not upon an "agreement", but rather upon the workmen's compensation act of the State of California, as applied by its Industrial Accident Commission.

Occidental Insurance Co. v. I.A.C., 1944, 24 Cal. 2d 310, 149 P.2d 841, is in no way in point. The California Supreme Court in that case annulled an Industrial Accident Commission award in the case of a *seaman* injured in the course of his employment *on land*, holding that seamen are governed by admiralty law.⁵ The basis of the Court's ruling is made clear from the following language (24 Cal. 2d at pages 315-316):

"Seamen have long been the wards of admiralty and a subject of special care under the maritime law. They

5. The logic of the ruling that seamen injured on land while on ship's business are covered by seamen's law in our view supports our position in this case, rather than Appellant's. It is eminently sensible to say that a seaman ashore on ship's business is still a seaman, whose rights and obligations should be determined by seamen's laws; it likewise makes eminently good sense to hold that an airline crew, flying over an ocean, is still an airline crew, and that their rights and obligations should be governed by the laws normally applicable to airline crews.

are definitely allied with maritime law and their treatment is a matter peculiarly within the rule of uniformity of the maritime law. For those reasons they may be said to be in a different category from harbor workers and longshoremen in respect to determining the extent that the maritime law is paramount. (See *O'Donnell v. Great Lakes etc. Co.*, supra, p. 43.) Hence, the most recent decisions of the United States Supreme Court have determined that they are under the wing of maritime law even though the injury occurs while the seaman is on land."

The Betsy Ross, 145 Fed. 2d 688, dealt with the very same injury involved in the *Occidental* case and noted that the defendant's argument that the case was governed by exclusive jurisdiction of the Industrial Accident Commission had already been rejected in the *Occidental* case.

Appellant cites California Labor Code Section 3203 as making the California Workmen's Compensation Act "self-subordinating". Section 3203 provides that the California Act "shall not apply to the employers or employments which, according to law, are so engaged in interstate commerce *as not to be subject to the legislative power of the State*, nor to employees injured while they are so engaged, except insofar as such divisions are permitted to apply under the Constitution or laws of the United States." (Emphasis added.)

In our original Brief (at pages 15-18) we cited the cases clearly holding that airline industrial injuries, although in interstate commerce, *are* subject to the legislative power of the State, even when occurring outside the territorial bounds of the State. Labor Code Section 3203 makes clear that the California Act is intended to apply to *every* situation except where it is beyond "the legislative power of the State." This general proposition is made concrete in this

particular case where the Industrial Accident Commission held that the California Workmen's Compensation Act applied to the instant case (Tr. 22-25).

In this connection, we do not understand Appellant's remarks on page 14 concerning the Commission's award and *res judicata*. In our original Brief, we pointed out that the Industrial Accident Commission had determined the contested issue as to its jurisdiction and the applicability of the California Workmen's Compensation Act; that this determination of a litigated issue had become final; that it was therefore *res judicata* under the case of *Sherrer v. Sherrer*, 1948, 334 U.S. 343, 92 L.Ed. 1429; and that Appellant was therefore estopped to challenge the proposition that the California Workmen's Compensation Act applied to the accident in question. We of course did not argue (as perhaps Appellant thinks) that the Commission, in its determination of the matter before it, had held that claims under the Death on the High Seas Act were thereby barred. The Commission made no such holding for the obvious reason that no such issue was before it. That, and that alone, is the meaning of the language from the referee's "Report on Decision" (Tr. 30, quoted in Appellant's Reply Brief at page 14). (The judgment of the Commission is of course its "Finding and Award" (Exhibit B, Tr. 22-25) and not the referee's "Report on Decision".) The question as to the *effect* of the application of the California Workmen's Compensation Act to the instant accident of course had to be determined by the court in which this issue was raised, namely the trial court in the instant action.

Appellant apparently contends that the Commission's finding was not *res judicata* because said finding was made "over protests and objections of appellant" (Appellant's Reply Brief, page 14). This is the first time we have ever

heard it contended that a judgment was not *res judicata* merely because the judgment was entered over the loser's objection.

Conclusion

We believe the foregoing has answered the new contentions raised in Appellant's Reply Brief and has shown:

- (1) That the *Jensen* doctrine is not here applicable;
- (2) That Appellant has misconstrued the *Higa* and *Trihey* cases;
- (3) That the "twilight zone" doctrine is not in point even by analogy; and
- (4) That Appellant's other contentions are without merit.

We submit that Appellant has failed to show any legal or practical reason to reverse the trial court's judgment. That judgment was correct and should be affirmed.

Dated at San Francisco, California, on June 29, 1959.

Respectfully submitted,

STEINHART, GOLDBERG, FEIGENBAUM
& LADAR
JOHN J. GOLDBERG
NEIL E. FALCONER

No. 16,298

IN THE

**United States Court of Appeals
For the Ninth Circuit**

VIRGINIA J. KING, as Administratrix of
the Estate of John Elvins King,

Appellant,

VS.

PAN AMERICAN WORLD AIRWAYS,
a corporation,

Appellee.

**Appeal from the United States District Court for the
Northern District of California, Southern Division.**

APPELLANT'S PETITION FOR A REHEARING.

JOSEPH EDWARD SMITH,
WM. SHANNON PARRISH,
JOHN B. LEWIS,

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Oakland 12, California,

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*Proctors for Appellant
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FILED

JUL 22 1959

PAUL P. O'BRIEN, CLERK



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No. 16,298

IN THE

**United States Court of Appeals
For the Ninth Circuit**

VIRGINIA J. KING, as Administratrix of
the Estate of John Elvins King,
Appellant,

vs.

PAN AMERICAN WORLD AIRWAYS,
a corporation,
Appellee.

**Appeal from the United States District Court for the
Northern District of California, Southern Division.**

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Albert Lee Stephens, Oliver
D. Hamlin and Gilbert H. Jertberg, United States
Court of Appeals for the Ninth Circuit:*

Appellant, Virginia J. King, as administratrix of
the estate of John Elvins King, hereby respectfully pe-
titions for a rehearing in the above-entitled action, and
urges the following in support thereof:

I.

PRELIMINARY STATEMENT.

(a) This petition is presented under Rule 23 of this Court, and within the time of the extension granted on October 14, 1959.

(b) On February 24, 1959, the opinion of the United States Supreme Court was filed in the case of *The Tungus v. Skovgaard* U.S., 3 L. ed. 2d 524, 79 S. Ct. The Supreme Court in *The Tungus* gave an interpretation of the Death on the High Seas Act (March 30, 1920, c. III, Sections 1-7, 41 Stat. 537, 46 USCA Sections 761-767) that would appear to be contrary to the views expressed by this court on its original hearing. The Supreme Court held that the reservation of rights under State statutes by Section 7 of the Death on the High Seas Act, referred to the territorial waters of the State. This case did not come to the attention of appellant until after the case had been submitted.

(c) The decision of this United States Court of Appeals in interpreting the California Workmen's Compensation Act (California Labor Code Sections 3500 et seq.) is contrary to the interpretation of that Compensation Act given by the Supreme Court of California in the case of *North Pacific SS Co. v. Industrial Acc. Commission*, 174 C. 346, 163 Pac. 199, which case held that the California Compensation Act does not exclude Federal admiralty jurisdiction as to a tort on the high seas, but only restricts a suitor to the Industrial Accident Commission if the suitor elects to seek redress before a state tribunal. Appellant

firmly believes that a rehearing should be granted for these reasons which are hereinafter set forth in somewhat greater detail, and respectfully asks that the same be held *en banc*.

II.

IT IS ESSENTIAL TO THE UNIFORM APPLICATION OF THE LAW THAT THE INTERPRETATION OF A FEDERAL STATUTE BY THE UNITED STATES COURT OF APPEALS BE IN CONFORMITY WITH THE INTERPRETATION OF THE UNITED STATES SUPREME COURT.

The opinion of the court in *The Tungas*, supra, held that the federal court would enforce a State wrongful death act for a death occurring on the territorial waters of the State since the Death on the High Seas Act would not be applicable to such territorial waters. We quote from the opinion of the court:

p 527 "We begin as did the Court of Appeals with the established principle of maritime law that in the absence of a statute there is no action for wrongful death. *The Harrisburg*, 119 U.S. 199, 30 L. ed. 358, 7 S. Ct. 140. Although Congress has enacted legislation, notably the Jones Act and the Death on the High Seas Act, providing for wrongful death actions in a limited number of situations, no federal statute is applicable to the present case; Skovgaard was not a seaman, and his death occurred upon the territorial waters of New Jersey."

p 529 "The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to 'leave unimpaired the rights under

State statutes as to deaths on waters within the territorial jurisdiction of the States' ”.

The opinion of the Supreme Court in *The Tungus v. Skovgaard* supra gives weight to and would appear to justify a quotation from District Judge Moscowitz of the Eastern District of New York from his opinion in the case of *Echavarria v. Atlantic & Caribbean Steam Nav. Co.*, 10 F. Supp. 677:

p 678 “With the enactment of the Federal Death Act, the conclusion cannot be avoided that the death statutes of the several states were superseded so far as they had been theretofore applied to death on the high seas.

It is clear that the Congress could pass such an act under its power to regulate commerce and in pursuance of the constitutional provision extending the judicial power of the government to all cases of admiralty and maritime jurisdiction.

Section 7 of the act (46 USCA Sec. 767) indicates a carefully devised congressional plan to leave unaffected the operation of state death statutes over waters within one league of shore. Section 1 (46 USCA Sec. 761) makes no mention of the state statutes, and there is implied in that omission the congressional intent that their operative force with respect to torts committed more than three miles from land be ended. The state statutes, diverse in their terms and conflicting in remedies, afforded a poor substitute for a uniform act which Congress alone could legislate. They applied, none the less, upon the theory that the states could enact laws creating rights concerning a subject within the domain of the paramount

authority of Congress to legislate so long as Congress failed to enact a statute relating to the same subject. In view of the congressional action, they can no longer be applied to American ships on the high seas.”

III.

THE INTERPRETATION OF STATE STATUTES IS THE FUNCTION OF THE HIGHEST COURT OF THE STATE WHOSE STATUTE IS UNDER CONSIDERATION AND THE FEDERAL COURTS ARE OBLIGATED TO FOLLOW THE INTERPRETATION GIVEN BY SAID STATE COURT.

That the interpretation of State statutes is the function of the highest court of the State whose statute is under consideration is too generally accepted to warrant other than a nominal citation. *The Tungus* supra. While there are exceptions, there are none that appear relevant in the case before us. The California Supreme Court in 1917, about three years prior to the enactment of the Jones Act and the Death on the High Seas Act decided the case of *North Pacific SS. Co. v. Industrial Acc. Commission* supra. The essential facts of the case and procedure are sufficiently set out in the first paragraph of the opinion:

p 347 “The respondent the Industrial Accident Commission of the state of California assumed jurisdiction and made its award in the case of a seaman in the employ of the petitioner, who was injured while his vessel, owned by citizens of this state, was upon the high seas. Application for writ of review was granted by this court. This application was based upon the contentions that the United States District Courts, under their ad-

miralty and maritime jurisdiction, were alone empowered to deal with the question, and that the Industrial Compensation Act of California (St. 1913, p. 279), in so far as it was sought to apply it to seamen, was an unconstitutional usurpation of that jurisdiction."

The court then declared that the California Compensation Act was not intended to oust or supersede Federal admiralty jurisdiction but only limit the claimant to the Industrial Accident Commission in the event that he elected to seek redress in a state tribunal. The decision of the court on the point is quoted as follows:

p 355 "In *State ex rel. Jarvis v. Daggett*, 87 Wash. 253, 151 Pac. 648, L.R.A. 1916A, 446, the Supreme Court of that state expressed a contrary view, holding that its Compensation Act was not meant to apply to maritime injuries and torts. It based its conclusion upon two features of the Washington act, which are likewise found in the California statute. One of these was the provision abolishing all other remedies and limiting the right to compensation to proceedings under the provisions of the act itself. But concerning this matter we think it sufficient to say that the similar language of our own act will not be construed as designed to exclude admiralty from a jurisdiction which it possesses, but merely to limit suitors in the tribunals of the state to the forum provided for the determination of these questions, viz. the Industrial Accident Commission. So understood, the language imports no more than a declaration that, if a suitor shall seek redress in personam for such an injury before a

state tribunal, he must go before the Accident Commission and the Accident Commission alone.”

Appellant does not believe that he can paraphrase the above statement of the law to further clarify the position of the California Supreme Court.

The Federal court of admiralty obviously had jurisdiction. The language of the court in *The Plymouth* (*Hough v. Western Transp. Co.*), 3 Wall. 20, 18 L. ed. 125 is as follows:

“The jurisdiction of the admiralty over maritime torts does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas or navigable waters—where it occurred.”

This language has been approved through the years, in land mark cases such as *Grant Smith Porter Ship Co. v. Rohde*, 257 U.S. 469, 66 L. ed. 321, and as recently as 1959, *Kermarec v. Transatlantique*, U.S., 3 L. ed. 2d 550. Sometimes the principle is stated more firmly as in *Berwind-White Coal Mining Co. v. City of N. Y.*, 135 Fed. 2d 443:

“The place where torts are committed, and not their nature, is decisive on the question of admiralty jurisdiction. *The Belfast v. Boon*, 7 Wall. 624, 637, 19 L. ed. 266.”

but always consistently. Judge Goodman in the case of *Wilson v. Transocean Airlines*, 121 F. Supp. 85, page 92 used the following language:

“Admiralty tort jurisdiction has never depended upon the nature of the tort or how it came about, but upon the locality where it occurred.”

With this background it is difficult for appellant to rationalize the statement of Judge Goodman in the case below, *King v. Pan American World Airways*, 166 F. Supp. 136, when he stated at page 139:

“Indeed the only aspect of this case which gives it any maritime flavor whatsoever is the locale of the accident.”

Since the enactment of the Death on the High Seas Act, appellant knows of no case in which admiralty jurisdiction has not attached for a death on the *high seas* caused by wrongful act, neglect, or default.

North Pacific SS. Co. v. Industrial Acc. Commission, supra, is not in conflict with *Alaska Packers Ass'n v. Marshall*, 95 Fed. 2d 279 (9 Cir.), for three reasons. First no cause of action was stated under admiralty law. Second there is no contention that the compensation claim ousted Federal jurisdiction. Third the case of *Alaska Packers Ass'n v. Alaska Industrial Board*, 88 F. Supp. 172, 174 indicates that the injury in the *Marshall* case was in Bristol Bay, and leaves open the question whether the deaths occurred within one marine league of the shore.

IV.

APPELLANT URGES THAT THE OPINION OF THE COURT FILED AUGUST 27, 1959 BE RECONSIDERED, THAT THE SAME BE VACATED, AND THAT THE JUDGMENT OF THE DISTRICT COURT BE REVERSED.

A.

General Statement of the Law Applicable.

The Death on the High Seas Act is a federal statute, which creates a cause of action for a death on the high seas enforceable in the federal courts of admiralty. Section 1 of the Act reads as follows:

“Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent’s wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.”

As to deaths occurring on the high seas this federal statute supersedes state wrongful death acts. *Lingren v. United States*, 281 U.S. 38, 74 L. ed. 696, 50 S. Ct. 207; *Wilson v. Transocean Airlines*, 121 F. Supp. 85. The Constitution of the United States (Article III, Sec. 2, par. 1) declares that the judicial power of the United States shall extend “to all cases of admiralty and maritime jurisdiction.” In the judiciary act of Congress of 1789 (Act Sept. 24,

1789, c. 20, 1 Stat. 73) the granting of admiralty jurisdiction to the district court was accompanied by a "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." *The Moses Taylor*, 4 Wall. 411, 431, 18 L. ed. 397 says of the savings clause "it is not a remedy in the common law courts which is saved, but a common-law remedy". The case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 61 L. ed. 1086, 37 S. Ct. 524, holds that a Workman's Compensation Act is not such a remedy as is included in the savings clause, using the following words:

p 218 "The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

The States having granted to the federal government jurisdiction in admiralty and maritime matters, the jurisdiction of the federal courts is quite apart from and independent of any state statute creating a liability or giving a remedy. The federal law of admiralty is created by federal statute and by decisions of the federal courts of admiralty. *The Tungus* supra; *Southern Pacific Co. v. Jensen* supra; *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 99 L. ed. 337, 342, 75 S. Ct. 368; *Washington v. Dawson & Co.*, 264 U.S. 219, 68 L. ed. 646. The navigable waters over which the federal government exercises admiralty and maritime jurisdiction are divided into two areas,

namely, the high seas, and State territorial waters; and the distinction is frequently determinative in the cases. *Southern Steamship Co. v. National Lab. Rel. Bd.*, 316 U.S. 31, 86 L. ed. 1246, 62 S. Ct. 886; *United States v. Rogers*, 150 U.S. 255, 37 L. ed. 1071, 14 S. Ct. 109; *Imbrovek v. Hamburg-American Steam Packet Co.*, 190 F. 229, affirmed 193 F. 234. The above observations and distinctions are of particular importance in the case at bar because until the case of *The Tungus* supra it was not entirely clear that the reservation of rights to the States by Section 7 of the Death on the High Seas Act, referred only to the territorial waters of the state and territories.

B.

A Cause of Action Conferred Upon a Person by a Federal Statute and Enforceable in a Federal Court May Not Be Extinguished by a State Statute.

Restricting ourselves to the facts in the case now before us, we may observe that there are two sources of power which may create a cause of action for death on the high seas. These two sources are the State government, *The Tungus* supra, and *The Hamilton*, 257 U.S. 398, 52 L. ed. 264, 28 S. Ct. 133, and the federal government, *The Tungus* supra. The State government loses its power once the federal government has entered the field, *Southern Pacific Co. v. Jensen* supra. Except to the extent that the forum in which the remedy may be enforced is limited by the terms of the statute creating the cause of action, state courts will enforce federal law, and federal courts will en-

force state law. *The Tungus* supra; *Western Fuel Co. v. Garcia*, 257 U.S. 233, 66 L. ed. 210, 42 S. Ct. 89.

The two statutes which we are considering in the case now before this court each provide a restriction as to the forum in which the remedy may be pursued. The Death on the High Seas Act may only be enforced in a Federal Court of Admiralty, *Wilson v. Transocean Airlines*, 121 F. Supp. 85, and the California Workmen's Compensation Act may only be enforced only by the California Industrial Accident Commission. *North Pacific SS. Co. v. Industrial Acc. Commission* supra.

Where the source of the authority which creates a cause of action is the State, that State [subject only to the limitations provided by the United States Constitution, and federal statutes implementing that Constitution] may alter a right or remedy, may substitute a new right or remedy, or terminate the right and remedy completely. California Constitution Art. IV, Sec. 1; *The Tungus* supra; *Caldarola v. Eckert*, 332 U.S. 155, 91 L. ed. 1968, 67 S. Ct. 1569; *Macmillan Co. v. Clarke*, 184 C. 491; *Western Indemnity Co. v. Pillsbury*, 170 C. 686; *People v. Coleman*, 4 C. 46. The fact that a state statute had been enforced in a federal court would not prevent the state terminating or changing the state right and thus indirectly depriving the federal court of the power to thereafter enforce a state statute. However this is entirely different from a holding that the state may by statute deprive a person of a federal right enforceable in a federal court. *The Lottawanna*, 21 Wall. 558, 22 L. ed. 654;

Butler v. Boston & Savannah S. Co., 130 U.S. 527, 32 L. ed. 1017, 9 S. Ct. 612.

If we assume for the moment that there was no California Workmen's Compensation Act, then the application of the Death on the High Seas Act in the present case, would follow without question. If we would further assume that the California Workmen's Compensation Act contained no provision limiting the remedy to one under the Compensation Act, no reason would exist for not applying the Death on the High Seas Act.¹ If this be sound, then the only factor that would serve to deprive a person of a remedy in a federal court based upon a federal statute, covering a subject over which federal jurisdiction is granted by the United States Constitution, would be a provision of a State statute cancelling such a remedy. If such be the power of the State statute, then it is the State and not the federal government that is the superior power on matters concerning the high seas.

Before bringing this petition to a conclusion, attorneys for appellant feel obliged to mention one further subject, which though of infinite practical significance is not truly a matter of law, and is stated here only because the subject was given some consideration in the opinion filed by this court. Libelant is told that it is more advantageous to look toward the Compensation Act rather than the Death on the High Seas

¹Whether or not the State could effectively legislate on an event occurring on the high seas is not considered here, as we are only considering for the moment the power of the State to limit federal power.

Act for a remedy. Counsel would suggest that the advantages to libelant if such were the case would be more theoretical than real. This conclusion is clearly demonstrated by the fact that this so called advantage is strongly urged by the respondent and as strongly declined by the libelant.

V.

CONCLUSION.

Wherefore, Appellant prays that this court's decision of August 26, 1959, be vacated, that a rehearing be granted *en banc* and, on rehearing, that the judgment of the Court below be reversed.

Dated, Oakland, California,
October 14, 1959.

Respectfully submitted,

JOSEPH EDWARD SMITH,
WM. SHANNON PARRISH,
JOHN B. LEWIS,
JOHN B. KRAMER,

*Proctors for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

We hereby certify that in our judgment the Petition for a Rehearing in Virginia J. King, as administratrix of the estate of John Elvins King vs. Pan American World Airways, a corporation, No. 16,298, is well founded and that it is not interposed for delay.

JOHN EDWARD SMITH,
WM. SHANNON PARRISH,
JOHN B. LEWIS,
JOHN B. KRAMER,
By JOHN B. KRAMER,
*Proctors for Appellant
and Petitioner.*



No. 16,298

In the

United States Court of Appeals

For the Ninth Circuit

VIRGINIA J. KING, as Administratrix of
the Estate of John Elvins King,

Appellant,

vs.

PAN AMERICAN WORLD AIRWAYS,
a corporation,

Appellee.

**Reply by Appellee in Opposition to
Appellant's Petition for a Rehearing**

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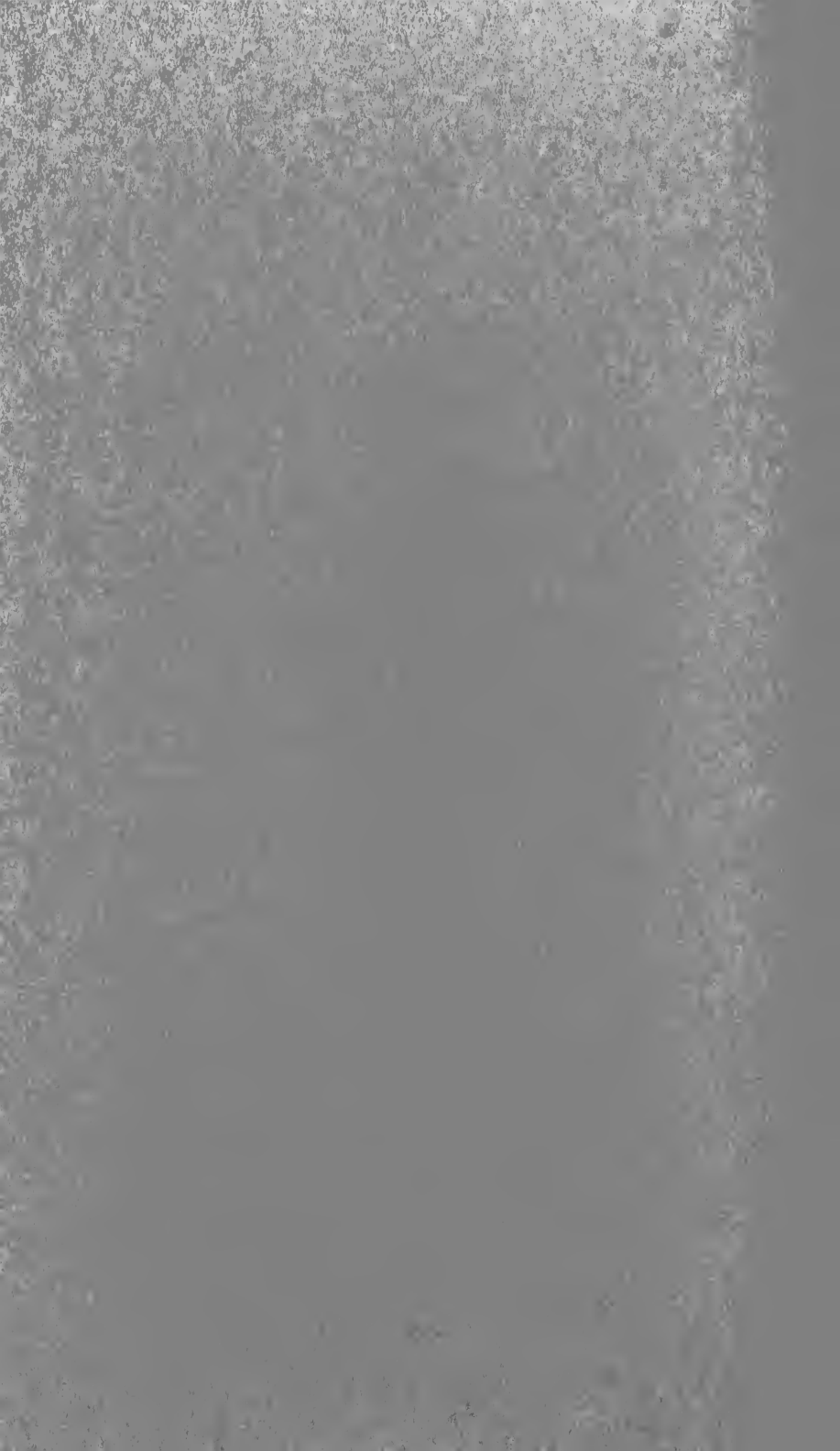
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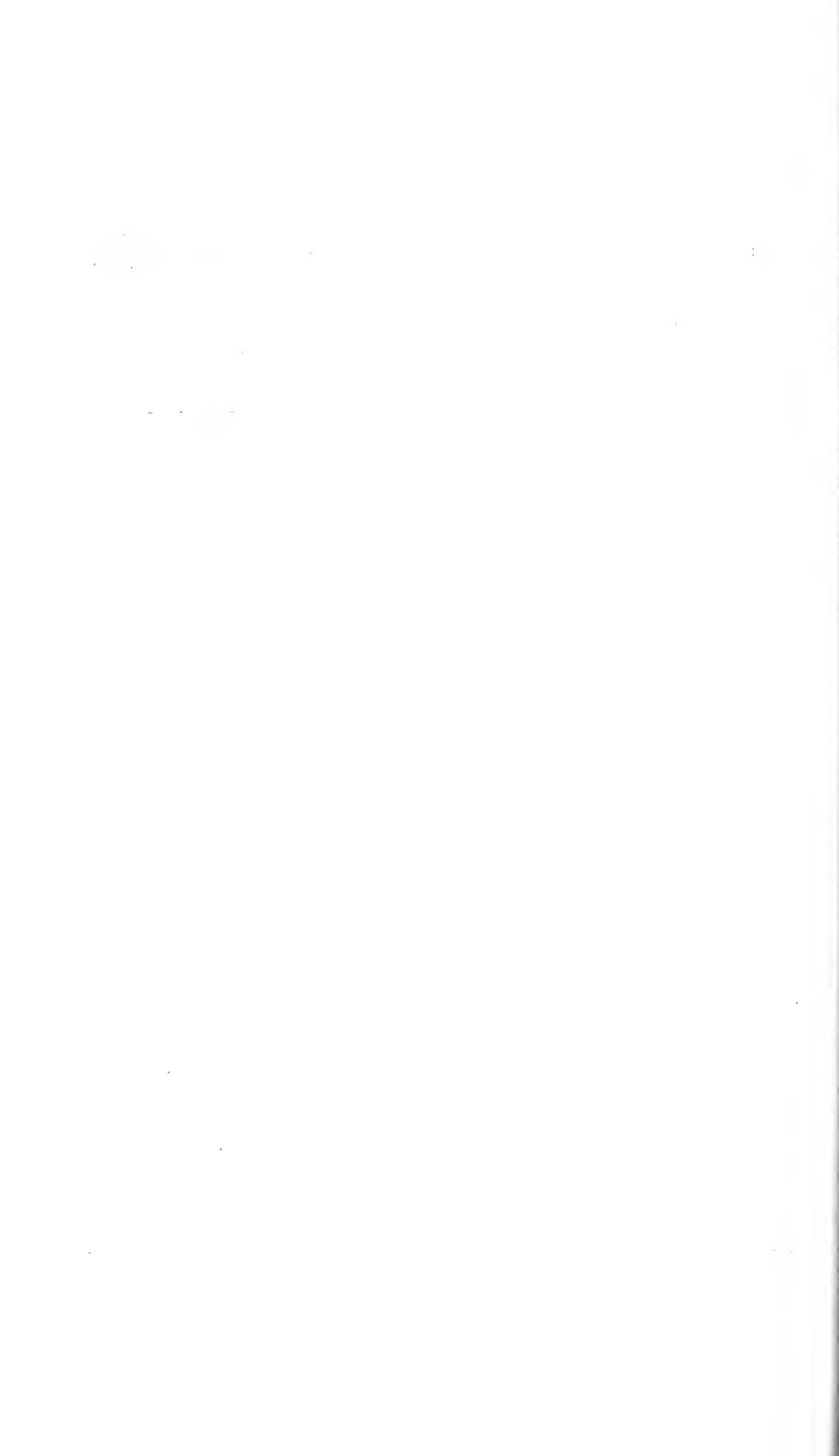
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No. 16,298

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Appellee.

**Reply by Appellee in Opposition to
Appellant's Petition for a Rehearing**

Preliminary Statement

In their Petition for Rehearing, Appellant's counsel have cited numerous new authorities and advanced new contentions not previously made in Appellant's two prior briefs. In view of this, we believe a further written reply on behalf of Appellee Pan American is appropriate.

In their petition, Appellant's counsel advance two new contentions and one old one:

(1) That in *The Tungus v. Skovgaard*, February 24, 1959, 358 U.S. 588, 3 L.Ed. 2d 524, the United States Supreme Court "held" that the operation of Section 7 of the

Death on the High Seas Act was restricted to State territorial waters ;

(2) That the construction by this Court of the exclusive remedy provision of the California Workmen's Compensation Act (California Labor Code Section 3601) is "contrary" to an authoritative opinion of the California Supreme Court construing this same section ;

(3) That where the locality of an accident is upon the high seas or navigable water, exclusive jurisdiction is conferred upon the admiralty courts, and application of State law in such situation violates the United States Constitution.

We will answer these contentions in the order listed.

The Tungus Case Did Not Pass Upon the Effect of Section 7 of the Death on the High Seas Act Outside State Territorial Waters.

The *Tungus* case involved the death of an oil company maintenance man while engaged in repair work on a ship docked in the port of Bayonne, New Jersey. The decedent's widow filed an action in admiralty against the ship and its owners (who were *not* the decedent's employers) to recover damages under the New Jersey State wrongful death act. Two questions were posed on appeal: (1) had the lower courts properly construed the State wrongful death act, and (2) were the Federal courts, in granting relief, restricted by the State wrongful death act or might plaintiff recover in situations not covered by the State act. The Court held: (1) the plaintiff's claim *was* limited to the State wrongful death act, and (2) the Court of Appeals had correctly construed that act. The Court's opinion began by noting "the established principle of maritime law, that in the absence of a statute there is no action for wrongful

death”; and then stated that, notwithstanding the Jones Act and the Death on the High Seas Act:

“No Federal statute is applicable to the present case; Skovgaard was not a seaman⁵, and his death occurred upon the territorial waters of New Jersey⁶.”

Footnote 6 reads as follows:

“The Death on the High Seas Act creates a right of action only for a ‘wrongful act, neglect, or default occurring on the high seas *beyond a marine league from the shore of any state* * * *’ 46 U.S.C. 761.” (Emphasis added.)

It seems quite clear that the Court’s reference to the reason the Death on the High Seas Act was inapplicable referred—not to Section 7 (as Appellant’s counsel impliedly asserts)—but to Section 1 of the Act (46 U.S.C. Sec. 761).

The Court then rejected the argument that the admiralty courts might engraft upon the State-created right of action additional Federal remedies not existing in the absence of the State right of action, in this respect quoting the Senate Committee Report on the Death on the High Seas Act, as follows:

“The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to “leave unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.” S Rep No. 216, 66th Cong. 1st Sess 3; HR Rep No. 674, 66th Cong. 2d Sess 3. The record of the debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong Rec 4482-4486.” (3 L.Ed. 2d at 529)

It is obvious that neither the facts nor the holding of the Court in *The Tungus* case in any way involved the opera-

tion of State statutes (let alone State workmen's compensation acts) beyond the territorial waters of the State and that the Supreme Court in no sense construed, or had occasion to construe, the meaning of Section 7 of the Death on the High Seas Act in that regard. If the language of the Court quoted above, however, be deemed to cast any light on this question, we submit it favors the position of Appellee, rather than of Appellant. The Senate Committee Report quoted in the Court's opinion related to the *original* draft of the Death on the High Seas Act *as reported from committee*, Section 7 of which would by implication have eliminated operation of State statutes beyond State territorial waters. It was because Congressman Mann objected to such elimination that he introduced the Mann Amendment, so that (in the words of the Supreme Court) "The power of the States * * * [would] in no way be affected by enactment of the Federal law." The Mann Amendment, of course, was adopted and is embodied in Section 7 in its present form.

The quotation by Appellant's counsel from *Echavarria v. Atlantic and Caribbean Steam Navigation Co.*, 1935, 10 Fed. Supp. 677, was previously set out in their closing brief, and needs no further answer here.¹

We submit that *The Tungus* does not support Appellant's contentions in this case.

Subsequent and Authoritative Opinions of the California Supreme Court Demonstrate that North Pacific Steamship Co. vs. I.A.C. Does Not Represent Current California Law.

We agree with Appellant's counsel that the meaning of California Labor Code Section 3601, which makes work-

1. See Supplemental Brief for Appellee Pan American, page 10, footnote 3.

men's compensation (where applicable) "the exclusive remedy against the employer * * *", is best determined by consulting the opinions of the California Supreme Court. We do not agree, however, that *North Pacific S.S. Co. v. I.A.C.*, 1917, 174 Cal. 346, 163 Pac. 199, constitutes valid authority as to the proper meaning of that statute. The *North Pacific* case was decided on February 3, 1917. The language quoted by Appellant's counsel (from pp. 355-356) was used by the Court in an effort to sustain jurisdiction of the Industrial Accident Commission over an injury to a *seaman* injured while his ship was upon the high seas, and was an attempt to square the result the Court sought to reach with the proposition that the traditional maritime remedies of *seamen* could not be affected. The effect of *Southern Pacific v. Jensen*, 244 U.S. 205, 61 L.Ed. 1086, decided by the United States Supreme Court three months later on May 21, 1917, was of course to overrule the *North Pacific Steamship* case.²

Two subsequent California Supreme Court opinions make it clear that the *North Pacific Steamship* case has also been overruled as to its construction of the "exclusive remedy" provision and that this provision is intended, where applicable, to exclude otherwise applicable admiralty remedies. In *City of Oakland v. Industrial Accident Commission*,

2. While the *North Pacific Steamship* case was not itself reversed by the United States Supreme Court (since apparently certiorari was not applied for), its companion cases, *Steamship Bowdoin Co. v. Pillsbury*, 174 Cal. 390, 163 Pac. 204 and *Alaska Pacific Steamship Co. v. Pillsbury*, 174 Cal. 389, 163 Pac. 204 (decided on February 7, 1917, four days after the *North Pacific* case in brief opinions citing and relying upon the *North Pacific* case) did go to the United States Supreme Court and were reversed by that Court in one-sentence opinions "upon the authority of *Southern P. Co. v. Jensen* * * *" in *Steamship Bowdoin Co. v. Industrial Accident Commission*, 244 U.S. 648, 62 L. Ed. 919, and *Alaska Pacific Steamship Co. v. Industrial Accident Commission*, 1918, 244 U.S. 648, 62 L.Ed. 920.

1926, 198 Cal. 273, 244 Pac. 353, the City of Oakland challenged an award granted by the Industrial Accident Commission to one of its employees, injured while working as a deckhand or "donkeyman" on a barge tied up at a City wharf in the Oakland Estuary. The Court discussed the facts, the applicable authorities, and affirmed the award, stating:

"We are of the opinion, therefore, that, under the circumstances stated, *the exclusive features of the Workmen's Compensation Act* of the state apply and *abrogate any remedies the injured employee would have under the general admiralty jurisdiction*. (Grant Smith-Porter Ship Co. v. Rohde, *supra*; Miller's Indemnity Underwriters vs. Braud, *supra*). On the authority of these decision we are satisfied that to permit the rights and liabilities of the parties to this proceeding to be determined by the respondent Commission, under the provisions of the Workmen's Compensation Act, will not in any way interfere with the characteristic features of the general maritime rules." (198 Cal. at pages 276-277; emphasis added.)

Alaska Packers Association v. I.A.C., 1927, 200 Cal. 579, 253 Pac. 926 (subsequently affirmed in *Alaska Packers Association v. I.A.C.*, 1928, 276 U.S. 467, 72 L.Ed. 656, cited and discussed in this Court's opinion in the instant case) is likewise to the same effect.

Contrary to Appellant's Contention, Admiralty Does Not Have Sole and Exclusive Jurisdiction as to all Occurrences Whose "Locality" Is Upon Navigable Waters, Particularly in the Case of Industrial Accidents. State Law May Operate Save Where It Would Materially Prejudice the Essential Uniformity of the General Maritime Law or Is Excluded by Act of Congress.

The final half of the Petition for Rehearing cites a variety of authorities for several different propositions. The

principal authorities, and the propositions for which they are cited, appear to be as follows:

(1) That admiralty has exclusive jurisdiction, to the exclusion of State law, over any and all occurrences whose "locality" is upon the high seas or navigable waters:

The Plymouth (Hough v. Western Trans. Co.) 1866,
70 U.S. 20, 18 L.Ed. 125;

The Lottawanna (Rodd v. Heartt) 1875, 88 U.S. 558,
22 L.Ed. 654;

The Moses Taylor, 1867, 71 U.S. 408, 18 L.Ed. 397.

(2) That there is a significant distinction, applicable here, between admiralty jurisdiction over the high seas, and over State territorial waters:

Southern Steamship Co. v. N.L.R.B., 1942, 316 U.S.
31, 86 L.Ed. 1246;

U. S. v. Rogers, 1893, 150 U.S. 255, 37 L.Ed 1071.

(3) That the Death on the High Seas Act supersedes State law as to deaths occurring on the high seas:

Lingren v. U. S., 1930, 281 U.S. 39, 74 L.Ed. 686.

Two propositions at once become evident upon even the most casual study of these cases: (1) they are almost uniformly old, even "ancient", and (2) the fact situations involved are almost uniformly wholly dissimilar to that presented in the instant case.

We will discuss these cases in the order cited.

(1) The Contention That Admiralty Jurisdiction Is Exclusive by Reason of the "Locality" of the Accident.

The Plymouth (Hough v. Western Trans. Co.), 1866, 70 U.S. 20, 18 L. Ed. 125, does contain the language Appellant quotes. That case, however, actually dealt with the question whether the owner of a wharf in the City of Chicago,

allegedly destroyed by a fire negligently caused by a vessel tied up to the wharf, might sue the vessel and its owners in admiralty. The Court held that since the property damaged was on land, admiralty had *no* jurisdiction and rejected the contention that the fact the fire allegedly originated on the vessel created admiralty jurisdiction. It was in this connection that the Court used the language quoted by Appellant, and it must of course be read in the light of these facts.³

The Lottawanna (Rodd v. Heartt) 1875, 88 U.S. 558, 22 L. Ed. 654, involved a claim of a materialman for a lien against a ship. The Court held that Federal admiralty law created no lien in favor of materialmen; that the admiralty courts would nevertheless enforce the liens created by State law, stating in this connection:

"It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of materialmen furnishing necessities to a vessel in her home port may be regulated in each state by state legislation." (88 U.S. at 579, 22 L. Ed. at 663)

3. Appellant's counsel note (at page 7 of the Petition for Rehearing) that *The Plymouth* has been cited with approval in various cases, citing certain of them. These cases likewise seem completely not in point.

Kermarec v. Transatlantique, 1959, 358 U.S. 625, 3 L. Ed. 2d 550, involved a claim against a shipowner by a visitor (not an employee), injured while visiting "aboard a ship upon navigable waters" (3 L. Ed. at page 553).

Berwind-White Coal Mining Co. v. City of New York, CCA 2, 1943, 135 Fed. 2d. 443, involved the question whether the admiralty court had jurisdiction over a suit upon a maritime contract (and specifically an indemnity clause of the contract) between a railroad company and the City of New York, with respect to maintenance and removal of a railroad trestle built over navigable water in the port of New York.

Citation of *The Plymouth* in *The Rohde* case (*Grant Smith-Porter Ship Co. v. Rohde*, 1922, 257 U.S. 469, 66 L. Ed. 321) demonstrates, we suggest, that *The Plymouth* is consistent, rather than inconsistent, with our position in this case.

but that the materialman in the instant case had no valid lien, since he had failed to perfect it in compliance with applicable State law.

The Moses Taylor, 1867, 71 U.S. 411, 18 L. Ed. 397, held that a State court had no jurisdiction *in rem* as to an action brought by a passenger against a steamship upon a maritime contract, noting that jurisdiction in the admiralty Court as to such controversies “has been made exclusive by Congress, and that is sufficient, even if we should admit that in the absence of its legislation the State might have taken cognizance of these causes.” (71 U.S. at 430, 18 L. Ed. at 402)

The two cases last discussed demonstrate that, contrary to Appellant’s contention, application of State law in maritime matters has a long and respectable history.

Instead of *The Plymouth* having established that any occurrence upon navigable water becomes at once *exclusively* of admiralty jurisdiction, as Appellant asserts, it did not even establish the proposition that the mere fact the “locality” of an occurrence was on navigable water was sufficient to confer admiralty jurisdiction (if the occurrence was not otherwise of a maritime nature). This question was *expressly reserved* by the United States Supreme Court in 1914 in the case of *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 58 L. Ed. 1208, involving the question whether an admiralty court had any jurisdiction over a stevedore’s action for personal injuries against his employer.⁴ In an opinion by Justice Hughes, the Court first noted *The Plymouth* line of cases containing language that maritime “locality” was sufficient in itself, then noted the defendant’s contention “that in every adjudicated case in this country

4. It is curious that Appellant’s counsel cited both the lower court opinions in the *Imbrovek* case (Appellant’s Petition for Rehearing, Page 11) but omitted to refer to the United States Supreme Court opinion in that case.

in which the jurisdiction of admiralty with respect to torts has been sustained, the tort, apart from the mere place of its occurrence, has been of a maritime character" (234 U.S. at pages 60-61, 58 L. Ed. at page 1212) and then held it was not "necessary to enter upon this broad inquiry" since, in any event "the wrong which was the subject of the suit was, we think, of a maritime nature, and hence the District Court, from any point of view, had jurisdiction." (*Idem.*)⁵

The decisive answer to Appellant's argument about "locality", of course, is to be found in the *Rohde, Braud, Alaska Packers*, etc. line of cases.⁶ Each of these cases held that the particular occurrence there involved had a maritime "locality" sufficient to confer admiralty jurisdiction in the absence of a State compensation act, but that such acts abrogated the otherwise applicable admiralty remedy. The proposition that "locality" is not the all-controlling factor in the instant type of situation—as Appellant would have it—is perhaps best demonstrated by the language of Chief Justice Taft in *London Guarantee & A. Co. v. Industrial Accident Commission*, 1929, 279 U.S. 109, 73 L. Ed. 632, in discussing and explaining the *Rohde, Braud*, and *Alaska Packers* cases. In pointing out that in those cases State workmen's compensation acts were properly held to exclude otherwise applicable admiralty remedies, Chief Justice Taft said:

"[Those cases] may be said to be of an amphibious character. They have an admiralty feature about them

5. See also the opinion of this Court in *Campbell v. H. Hackfield & Co.*, 1903, C.C.A. 9, 125 Fed. 696, holding that admiralty tort jurisdiction requires, in addition to maritime "locality", that "maritime relations of some sort must exist", and that stevedore employment was not of a sufficiently maritime nature to satisfy this requirement. This case must be deemed overruled on its facts by the *Imbrovek* case, which held stevedore employment *was* of a maritime nature, but it is noteworthy that the *Imbrovek* case did *not* disapprove of the remainder of the *Campbell* opinion.

6. Cited and discussed at pages 10-11 of this Court's opinion in this case, and at pages 20-22 of Appellee's original brief.

in the locality where they occurred, although even this is doubtful with respect to the Alaska case. But the contract in the Rohde Case was nonmaritime, the ship was incomplete, and being completed under a nonmaritime contract, both parties had made a nonmaritime contract with reference to their liabilities and not in contemplation of the admiralty law. The Braud Case was one of a maritime tort. *But it had no characteristic feature of the general maritime law except locality*, and it was very like in its relation to the state law to the Rohde Case. *The employment was not maritime, and the transaction and the circumstances thus seemed to have but one characteristic that was maritime.* (279 U.S. at 121, 73 L.Ed. at 635-636; emphasis added.)”

7. In its actual holding in the *London Guarantee* case, the Court set aside an award of the California Industrial Accident Commission granted for the death of a *seaman*, employed on a fishing vessel in Santa Monica Bay, who was drowned while seeking to rescue a drifting vessel. The Court stated that (in contrast to the cases discussed above):

“Here it is without dispute that the deceased was a *sailor*; that his employment and relation to the owner of the vessel were maritime. It is without dispute that the vessel in the navigation of which he was employed was registered as a vessel engaged in the navigable waters of the United States in the business of transporting people for hire. He was a skipper engaged in assisting the navigation of these registered vessels from their mooring place in Santa Monica bay to the place where the deep-sea fishing was to be carried on, a distance of from 3 to 5 miles or more, all in navigable waters. The vessels were capable of navigation for 500 miles. *There was no feature of the business and employment that was not purely maritime.*” (279 U.S. at 123, 73 L. Ed. at 636; emphasis added)

and held that to apply a State workmen’s compensation act in such a situation “would certainly be prejudicial to the characteristic features of the general maritime law.”

The case cited at page 8 of Appellant’s Petition for Rehearing, *Alaska Packers Assn. v. Alaska Industrial Board*, 1950, 88 Fed. Supp. 72 (affirmed in *Alaska Industrial Board v. Alaska Packers Assn.*, 1951, C.A. 9, 186 Fed. 2d 1015, an opinion of this Court by Justice Denman) followed the *London Guarantee* case. In holding

This quotation wholly refutes any contention of Appellant that the admiralty courts have exclusive jurisdiction of any and all industrial accidents (regardless of the nature of the employment) provided only their "locality" is maritime.

(2) The Alleged Distinction Between the High Seas and Navigable Waters.

The allegedly important distinction between the high seas and State territorial waters which Appellant suggests (at page 11 of the Petition for Rehearing) is contradicted, rather than supported, by the cases there cited. Thus, *Southern Steamship Co. v. N.L.R.B.*, 1942, 316 U.S. 31, 86 L. Ed. 1246, held that the laws against mutiny governed a ship's crew both on the high seas and while in port, and therefore set aside a reinstatement order of the N.L.R.B. on the ground the N.L.R.B. improperly held that seamen conducting a "strike" while their ship was *in port* were not guilty of misconduct barring reinstatement. In *U. S. v. Rodgers*, 1893, 150 U.S. 255, 37 L. Ed. 1071, the Court held that a criminal statute covering assaults made by persons "upon the high seas, or in any river * * * within the admiralty jurisdiction of the United States" was applicable to an assault committed on a vessel in the Detroit River in the Great Lakes, on the Canadian side of the international line. Not only do these opinions reject the distinction Appellant seeks to make, but they are so completely dissimilar from the issues in the instant case that we fail to see how they are remotely in point.

that Alaska's workmen's compensation act could not be applied to a seaman, Judge Denman pointed out (at p. 1016) that

"The obligations and correlative rights of the owner of a vessel to the members of her crew constitute one of the most important of the 'characteristic features of the general maritime law' which",

under the *Jensen* doctrine, could not be affected by State legislation.

In our case, unlike the *Rohde*, *Braud* and *Alaska Packers* cases, the decedent's employment was not even "amphibious", but was *wholly* non-maritime.

(3) The Alleged Supersession of State Law by the Death on the High Seas Act.

Lingren v. U. S., 1930, 281 U.S. 38, 74 L.Ed. 686, held that in enacting the Jones Act, granting rights of action against a seaman's employer in negligence for personal injuries or death of a seaman, Congress intended to exclude actions against an employer for a seaman's death based upon State wrongful death acts. This holding is totally unlike the situation presented here. The *Lingren* case involved a specific act of Congress expressly regulating the rights and remedies between seamen and their employers as to industrial injuries *in a specified employment*. The Jones Act has no section comparable to Section 7 of the Death on the High Seas Act, expressly preserving State jurisdiction, and no legislative history showing that the intent of Congress was to preserve such jurisdiction.

Appellant argues that a right of action under a Federal statute cannot be abrogated by State law. It is clear, however, under the *Rohde*, *Braud*, *Alaska Packers* line of cases that in general Federal admiralty remedies *may* be abrogated in this type of situation by State workmen's compensation acts. Whether this is true of the Death on the High Seas Act is, of course, purely a matter of Congressional intent. As this Court held, the language, purpose and legislative history of the Death on the High Seas Act clearly demonstrates that it was enacted by Congress merely to fill a void in the law, and that it was not the intent of Congress to supersede State workmen's compensation acts, or their exclusive remedy provisions. The complete failure of the Petition for Rehearing, like Appellant's prior briefs, to discuss the language, purpose or legislative history of the Act is, we submit, the clearest evidence that this Court's holding was correct.

Miscellaneous Points Answered

Appellant's counsel state (Petition for Rehearing, page 8) that they know of "no case" in which admiralty jurisdiction has not attached for a death on the high seas. We reply by stating that we know of no case (and Appellant's counsel have cited none) holding that industrial injuries of airline crews, whether occurring over the high seas or elsewhere, are not covered by State workmen's compensation acts and their exclusive remedy provisions.

Appellant's counsel suggest that the pecuniary advantages of a cause of action under the Death on the High Seas Act exceed those of a remedy under the State Compensation Act. Counsel of course concede that this, even if true, is without legal relevance. When, however, the unavoidable hazards, uncertainty and delay of a common law action for negligence are taken into account (particularly in an accident where an airplane is lost at sea, without survivors), Appellant's suggestion seems dubious indeed. It seems worthy of comment, in this connection, that—as Appellant's counsel expressly conceded at the oral argument—Appellant has found it to her advantage not to appeal from the Industrial Accident Commission award but has instead accepted its benefits.

Conclusion

The foregoing demonstrates that the new contentions advanced by the Appellant in the Petition for Rehearing are without merit. Appellant's counsel have completely failed to demonstrate any error in this Court's opinion, or any reason why a rehearing should be granted.

Appellant's Petition for Rehearing should therefore be denied.

Dated at San Francisco, California, on November 20, 1959.

Respectfully submitted,

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